

CASE NO. 93-6431

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

JOHN EARL BUSH,

Petitioner,

vs.

HARRY K. SINGLETARY,

Respondent.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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November 18, 1993

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1 dispute about that and that's about all he could add, I
2 think.

3 So I don't think we need to waste -- that would
4 delay this Court from making any decision in this case. We
5 would have to wait till the 12th. We would have to get a
6 transcript of that so I could read it. It would just delay
7 matters and I think it would be better not to, so I'm not
8 going to permit that.

9 MR. BARTMON: Just for record purposes, I just
10 want to note that I would object to Your Honor's ruling,
11 but just for the record.

12 THE COURT: Okay. Your objection is noted. And
13 I think it would just be cumulative and repetitious. Okay.

14 Now, call your next witness.

15 MR. NOLAS: Yes, we would call Mr. Muschott.

16 THE COURT: Call Mr. Muschott, please. Come
17 forward and be sworn.

18 LEE EDWARD MUSCHOTT, PETITIONER'S WITNESS, SWORN

19 THE CLERK: State your name for the record and
20 please spell your last name.

21 THE WITNESS: My name is Lee Edward Muschott.
22 Last name is M-u-s-c-h-o-t-t.

23 DIRECT EXAMINATION

24 BY MR. NOLAS:

25 Q Mr. Muschott, how are you, sir?

1 A Fine, thank you.

2 Q My name is Billy Nolas and I'm currently representing
3 Mr. Bush. Do you know Mr. Bush seated over here
4 (indicating)?

5 A Yes, I do.

6 Q Can you tell us how it is that you know him, sir?

7 A I was appointed to represent him in connection with a
8 case in Martin County.

9 Q And do you recall what the charge was in that action?

10 A He was charged with armed robbery, kidnapping, and
11 first degree murder.

12 Q At the time of Mr. Bush's trial, how long had you been
13 an attorney?

14 A That was 1982. I was admitted in May of 1974.

15 Q And had you had any experience with the Public
16 Defender's Office prior to that?

17 A As a Public Defender?

18 Q Yes.

19 A No, not as a Public Defender.

20 Q Had you had any experience as a prosecutor prior to
21 Mr. Bush's trial?

22 A No.

23 Q Have you had an opportunity recently to review any
24 records of yours or from the court files or anything along
25 those lines in Mr. Bush's case?

1 A I briefly reviewed a report by a psychologist. The
2 name escapes me. A lady.

3 Q Carbonell?

4 A Yes.

5 Q Anything else that you've had an opportunity to
6 review?

7 A I have been given some materials. I haven't had an
8 opportunity to review them in depth.

9 Q Have you had an opportunity recently to review the
10 penalty phase transcript at the Bush trial?

11 A I haven't reviewed that recently.

12 Q Do you have some recollection about that, your
13 firsthand experience?

14 A Yes, I do.

15 Q Could you -- how is it that you came about getting Dr.
16 Carbonell's report, by the way?

17 A It was given to me by Mr. Bartmon, a copy of that,
18 together with the petition and all of the attachments. It
19 included the transcript abstracts. That was included in
20 the package.

21 Q Have you had an opportunity to bring your file with
22 you?

23 A Yes, sir, I have.

24 Q What I would like to do is just ask you certain
25 questions covering certain general areas in Mr. Bush's case

1 and basically, if you recall, you can provide us with an
2 answer. If you don't, then the records to a certain extent
3 can speak for itself. I'm sure, as you remember, it's kind
4 of extensive.

5 MR. NOLAS: And, Your Honor, these documents are
6 for the most part in the record. Some of them are from Mr.
7 Muschott's file. I can represent that they are from the
8 copy that Mr. Muschott provided us. And that if Mr.
9 Bartmon would like, we could --

10 THE COURT: You say they're in the record. Are
11 they an exhibit?

12 MR. NOLAS: They're in the record on appeal as
13 Exhibit 1. Most of these documents are. And rather than
14 pulling them from the original record and all that, I'm
15 just going to use my copies and we can have them marked
16 again.

17 THE COURT: That will be fine. You don't have
18 any problem with that?

19 MR. BARTMON: No, I don't as long as I can see
20 the document before he shows it to the witness.

21 MR. NOLAS: (Tendering)

22 MR. BARTMON: Okay.

23 BY MR. NOLAS:

24 Q Mr. Muschott, let me just show you this document and
25 ask if you identify that for us, please.

1 A This appears to be the judgment and sentence that was
2 entered on Mr. Bush's prior offense which predated the
3 offenses that he was charged with that I represented him
4 on.

5 Q And did that have a cover memorandum with it?

6 A When I received it?

7 Q Yes.

8 A I frankly don't recall.

9 Q Okay. Is there a cover memorandum with it?

10 A There is here.

11 Q Can you tell us what that says, basically?

12 A From Jim Midelis to Lee E. Muschott, "Enclosed please
13 find a copy of the judgment and sentence of John Bush's
14 previous conviction. If you have any questions, please
15 call me."

16 Q And that was forwarded to you by the State Attorney's
17 Office?

18 MR. BARTMON: Objection. The witness said he
19 didn't recall.

20 THE COURT: Well, he's asking him whether it was.

21 MR. BARTMON: I think the previous question was,
22 the witness said he didn't recall whether this was on the
23 sheet he was given, so --

24 THE COURT: Well, he did, but are you referring
25 to the sheet or are you referring to the --

1 THE WITNESS: I recognize --

2 BY MR. NOLAS:

3 Q Mr. Muschott, do you recall receiving that from the
4 State Attorney's Office?

5 A I don't have a specific recollection of receiving it
6 from the State Attorney's Office. I do recognize the
7 judgment and sentence.

8 Q Okay. With regard to that judgment and sentence, did
9 you, yourself, obtain any other records about Mr. Bush's
10 1974 conviction?

11 A I didn't obtain any records. To the best of my
12 recollection, I reviewed the court file. And I think by
13 that time it was on microfilm at the St. Lucie County
14 Courthouse. And then I spoke with the Assistant Public
15 Defender who had represented him in that case which was
16 Richard Shott.

17 Q Now, with regard to that case, did you ever obtain the
18 transcript of the case itself, of the trial?

19 A No, I did not.

20 Q Did you obtain any Division of Youth Services records
21 regarding that case?

22 A I didn't obtain any records. If I had reviewed any,
23 they would have been only those records that would have
24 been part of the Circuit Court file.

25 Q Do you recall what was in the Circuit Court file?

1 A I don't have an independent recollection of all the
2 documents, but it would have consisted of the usual bilevel
3 Circuit Court file, which would have been the information
4 and probably a demand for discovery and response, and then
5 various subpoenas and, of course, the pre-sentence
6 investigation report. And the judgment and sentence would
7 have been included as well.

8 Q You indicated you did see that, the pre-sentence
9 investigation report on that case?

10 A I don't have an independent recollection of seeing the
11 report or the contents. But I do recall I reviewed the
12 file and there would have been a pre-sentence
13 investigation, certainly.

14 Q Could you relate to us what your impression was at the
15 time with regard to the pre-sentence investigation in the
16 '74 case?

17 A I frankly don't have an independent recollection of
18 this time of what my impression was.

19 Q Now, at the period of time we're talking of prior to
20 Mr. Bush's trial --

21 A Right.

22 Q -- did you obtain Mr. Bush's juvenile record and Youth
23 Division records, anything along those lines?

24 A I did not obtain any juvenile records.

25 Q During that same period of time, did you obtain any

1 Department of Corrections records regarding Mr. Bush's
2 incarceration records, those types of things?

3 A No, I didn't obtain any DOC records.

4 Q What about his school records? Did you obtain any
5 school records? Did you do that?

6 A No.

7 Q Again, during that same period of time, did you obtain
8 any records of prior psychological evaluations, prior
9 mental health evaluations, anything along those lines?

10 A No.

11 Q Did you, again during that same period of time, speak
12 to any, for example, professionals who had seen Mr. Bush in
13 the past, whether in school or in Youth Services or in the
14 Department of Corrections, the person who prepared the PSI,
15 for example, or psychologists or anybody like that that you
16 recall prior to this case?

17 A Prior to the trial of this case? The only
18 professional that I would have spoken with would have been
19 Mr. Shott who represented him in that prior --

20 THE COURT: That's the Public Defender?

21 THE WITNESS: Yes, sir, it is, Your Honor.

22 BY MR. NOLAS:

23 Q Would it be fair to say that, again before the trial
24 here in '82 or up until the verdict came in, you were
25 unaware of the contents of these records that we're talking

1 about?

2 A The DOC records?

3 Q DOC, school, juvenile, those types of things. Prior
4 psychological, that kind of stuff.

5 A Right.

6 Q Now -- and let me just ask you, if you recall in this
7 regard, let me just ask you a few fact specific questions
8 here.

9 Up until the point of Mr. Bush's trial in this case,
10 in the '62 case, do you recall -- I'm just ask you the
11 names and you can tell me if you recall speaking with these
12 individuals. Do you recall speaking with Denise Ferrell?

13 A The name rings a bell, but I don't have an independent
14 recollection of speaking with her.

15 Q How about Chester Beacham? Is that someone you spoke
16 to?

17 A No.

18 Q What about Debora Mitchell?

19 A No.

20 Q What about W. C. Bush, Jr., not the father?

21 A To the best of my recollection, that was Mr. Bush's
22 younger brother.

23 Q Right.

24 A And I did speak with him prior to the trial. He came
25 to the office a couple of times.

1 Q Do you recall what you spoke to him about?

2 A Well, we discussed John's case and the -- he, of
3 course, was concerned as a family member, his brother. And
4 I don't have an independent recollection of all of our
5 discussions, but we discussed the State's case against
6 John.

7 I briefly reviewed with him what I felt the
8 appropriate defense strategies were and trying to answer
9 any questions that he had. I spoke to him about John's
10 background and the family background in general.

11 I told him that if there were any other family members
12 that had any questions, they could feel free to contact me.
13 John was incarcerated in Martin County and, of course, no
14 bond. So family members were in Fort Pierce which is where
15 my office was located.

16 Q Surely. By the way, did you speak to Tony Knight or
17 Luigi Phillips, the co-defendants in the '74 case at any
18 point?

19 A No.

20 Q Did you speak to whoever their attorneys may have been
21 at any point?

22 A I don't recall who their attorneys were. Mr. Bush had
23 Mr. Shott and I can't recall at the time that Mr. Shott
24 represented Mr. Bush in that prior offense whether Mr.
25 Shott was still with the Public Defender's Office or

1 whether he was a Special Public Defender in that case. So
2 I don't recall who the attorneys were for the other two
3 co-defendants.

4 Q And Mr. Shott had represented Mr. Bush in that other
5 case?

6 A Right.

7 Q How about Willie Beacham? Is that someone that you
8 recall speaking to?

9 A No.

10 Q David Smith?

11 A No.

12 Q Peter Freeman?

13 A No.

14 Q Christine Avaret?

15 A No.

16 Q Joanne Hawkins?

17 A No.

18 Q Janie Nicholson?

19 A No.

20 Q Katherine Lewis?

21 A No.

22 Q Gregory Parish?

23 A No.

24 Q Moses Mitchell?

25 A No.

1 Q Wilbur Phillips?

2 A No.

3 Q James Phillips?

4 A No.

5 Q Okay. And Madeline Hinton is the person who prepared
6 the PSI that you referred to in '74. Actually she didn't
7 prepare the PSI. She was involved in that investigation.
8 You never spoke to her, did you?

9 A No.

10 Q What about Randy Cecil?

11 A No.

12 Q J. B. Collins?

13 A No.

14 Q Now, I mentioned a moment ago W. C. Bush, Sr., the
15 father. You did speak to him, I believe, prior to the
16 trial?

17 A Yes, sir, I did.

18 Q Would that be the same as with W. C., Jr., would that
19 be sort of a -- they would ask you what's going on in the
20 case, that kind of thing?

21 A Yes, sir.

22 Q Other than those two, the father and W. C., Jr., do
23 you recall speaking to any other family members of Mr.
24 Bush's?

25 A No, I don't.

Q Okay. Did these two gentleman, the two W. C.s appeared concerned about John?

A Yes, they did.

Q What was their perspective of the facts of the case? Were they surprised? Were they -- when you told them -- I assume you told them what the State was going to try to prove.

A Sure.

Q How did they react? Were they perplexed, surprised?

A They weren't surprised. I think the period for surprise if there had been any -- and I don't know what went through their minds obviously -- had passed by the time I became involved in the case because, of course, Mr. Shott had been appointed in this case as well. And then I replaced him. So, the case had been -- the arrest and the case preceded my involvement by, to the best of my recollection, a week or two. They were both very concerned. Mr. Bush, as I recall, my impression of his reaction was --

Q By Mr. Bush, you mean --

A I'm sorry, Mr. Bush, Sr.

Q W. C. Sr.?

A Yes, sir. My recollection and my impression of his reaction was that he was deeply concerned and deeply saddened. W. C., Jr., was deeply concerned and more

interested in what the facts were and what evidence the State had.

I did tell Mr. Bush, Sr., as the case developed what the facts were developing to be and what evidence the State appeared to have. And he listened to that, but he didn't ask too many questions in that regard.

Mr. Bush, Jr., was more interested and seemed to be more interested in finding out details in that regard, in that aspect of the case.

Q By the way, did you ever obtain Mr. Bush's jail records in this case?

A I don't think I did, no.

Q What about jail records as opposed to prison records from any prior case, say, from the '74 case?

A No.

Q Were you aware -- withdraw that, Your Honor.

Did you ever speak to a gentleman by the name of Bill Ross who was a cellmate of Mr. Bush's?

A Bill Ross?

Q Yeah. Does that name ring any bells?

A No, it doesn't.

Q Let me ask you just a couple of other folks. Brenda Carter? Is that anyone?

A No.

Q You didn't speak to Brenda Carter. Let me rephrase

1 that question.

2 A That's correct. I did not speak to her. I don't have
3 a recollection of speaking to her.

4 Q Now, did Mr. Bush, Sr., and his son, W. C., Jr., did
5 they come to your office of their own accord?

6 A Yes.

7 Q You didn't have to go out and sort of drag them in or
8 anything, did you?

9 A No.

10 Q Did you ever, yourself, go to their area of residence,
11 to where the Bush family lived?

12 A I don't believe I did. I'm familiar with the area,
13 but I don't think I ever went to their home.

14 Q Did you go to the home of any family members as far as
15 you recall of Mr. Bush's or a friend or a neighbor or
16 somebody that he knew from the community?

17 A No.

18 Q Do you recall calling or telephoning any family member
19 or friend, people in the community who knew Mr. Bush prior
20 to the trial?

21 A I'm sure that I did speak with Mr. Bush, Sr., on the
22 phone. And I think probably I spoke with Mr. Bush, Jr.

23 Q And do you recall whether you called them or they
24 called you about information or how that came about?

25 A I think it was probably was they called me or I

1 returned their call. I did speak to them. I did initiate
2 telephone calls to them on a couple of occasions. If I was
3 working on the file and I felt I needed some specific
4 information, you know, I had a number that I could call and
5 I would call and leave word or speak with them if they were
6 there.

7 Q They were concerned; isn't that --

8 MR. BARTMON: Objection. Judge, I've tried -- I
9 think the questions are more and more leading.

10 THE COURT: Well, I think he's going to have to
11 lead this witness to some degree. And if you want me to
12 decide, I'll decide. And I think he is sufficiently
13 identified with the other side that you may ask leading
14 questions. I don't want you to get into --

15 MR. NOLAS: I don't think either Mr. Muschott or
16 Your Honor -- this has not been cross-examination by any
17 stretch.

18 THE COURT: At least to develop the testimony, I
19 will permit that. Go ahead.

20 MR. NOLAS: Thank you, Your Honor.

21 BY MR. NOLAS:

22 Q Mr. Muschott, they were concerned, the two family
23 members that you did speak to, they were concerned about
24 John, were they not?

25 A Yes.

1 Q Let me show you a document from your file, Mr.
2 Muschott, and you can just double-check on me to make sure
3 I have the right document. And let me just ask you a
4 couple of questions about it.

5 Can you just identify this for us, please?

6 A This is a memo to file dated 5-28-82 --

7 THE COURT: It probably would be helpful for
8 record purposes if you tell us at least from which exhibit
9 this comes. Is this again from Exhibit 1?

10 MR. NOLAS: No, this is one of those documents
11 that I referred to in the beginning that when I said, Your
12 Honor, they may be a couple of things we left out of the
13 exhibit list. This from Mr. Muschott's file. We haven't
14 formally --

15 THE COURT: So you're going to -- this is one
16 that you're going to offer as an exhibit?

17 MR. NOLAS: What I propose to do is when we --
18 I'm leaving -- the documents I'm giving Mr. Muschott, I'm
19 leaving up there with him. And when we complete, my
20 proposal is to just take the whole bunch and mark it as
21 Exhibit -- I think we're up to 14 -- if that's okay with
22 the Court.

23 THE COURT: Is that all right with you, Mr.
24 Bartmon?

25 MR. BARTMON: I'd rather for admissibility

1 purposes take them one at a time, but I don't have any
2 objection to doing that at the conclusion of the testimony.

3 MR. NOLAS: All of them, Judge, are documents
4 from the record on appeal or from Mr. Muschott's file. I
5 mean, there's no --

6 THE COURT: Well, those are from the record on
7 appeal, I think, are already in evidence, are they not, as
8 Exhibit No. 1?

9 MR. NOLAS: Yes, but again I'd like to show them
10 to Mr. Muschott.

11 THE COURT: Well, sure, you can do that so that
12 he can explain it. But those that are not in evidence such
13 as this, if you're going to ask him to publish it or read
14 from it or do anything like that, it needs to be in
15 evidence first.

16 MR. NOLAS: Well, why don't we, subject to
17 admissibility, have these identified as I think it's
18 Exhibit 14 that we're up to?

19 THE COURT: Are you going to have any objection
20 to any of these documents?

21 MR. BARTMON: See, I don't believe I will, but I
22 wouldn't know that for certain until I actually review each
23 and every one. I can't assume I'm not going to have any
24 objections.

25 THE COURT: All right. They can be a part of 14,

1 but I think we should make them A, B, C, or what have you,
2 so if we ever need to refer to them again, we'll know which
3 document we're talking about.

4 BY MR. NOLAS:

5 Q Okay, then. Mr. Muschott, let's call the first one
6 14A. That was the memorandum from the State Attorney's
7 Office with the 1974 records.

8 A Okay.

9 Q And we can call this one 14B.

10 A Okay. Incidentally, I'm just now glancing again at
11 this memorandum. It has a date stamp on here which appears
12 to have been the date stamp that was put on here by my
13 office.

14 Q Okay. Could you tell us the date on there?

15 A September the 15th, 1982.

16 Q Do you recall when the trial was?

17 A October or November, 1982.

18 Q Okay.

19 A I think it was November.

20 Q Anyway, with 14B, let's turn to 14B, can you identify
21 that for us?

22 A Okay.

23 THE COURT: Maybe Mr. McClain can help you. Have
24 you got some of these little exhibit tags?

25 MR. McClain: No, I don't have any, but if you

1 would like --

2 THE COURT: We'll give you some. Start -- get a
3 stapler and start marking those so they're premarked as our
4 local rules require.

5 MR. NOLAS: I'm sorry, Your Honor.

6 THE COURT: Because, otherwise, we're going to
7 lose track of this.

8 Let's talk about 14B now. We're going to go
9 ahead and let him talk about these documents as if they are
10 in evidence, unless you have some objection to that, Mr.
11 Bartmon.

12 MR. BARTMON: I don't have any objection to that
13 procedure, no, Your Honor.

14 THE COURT: Okay.

15 BY MR. NOLAS:

16 Q Mr. Muschott, I'm sorry. Could you identify for us
17 what 14B is and just tell us what it is?

18 A It's a copy of a memo from my file.

19 Q And can you tell us what that memo is about?

20 A Yes, it says that John Earl Bush's brother-in-law,
21 Moses Mitchell, called and left his home number in Fort
22 Lauderdale and his work number in West Palm Beach.

23 Q Are the numbers listed in that memorandum?

24 A Yes, they are.

25 Q By the way, did you prepare that memorandum or did a

1 secretary prepare it for you or do you recall?

2 A I dictated this because my secretary has typed my
3 initials on here. So that means that I dictated that memo.

4 Q And you indicated you didn't speak to Mr. Moses
5 Mitchell before these proceedings; you indicated that
6 earlier?

7 A That was my recollection at that time. This refreshes
8 my recollection.

9 Q Do you recall following up on that telephone call?

10 A I'm sure I did. I don't have an independent
11 recollection of what, you know, the conversation consisted
12 of. But I certainly spoke with him on the phone and
13 dictated this memo pursuant to that telephone conversation
14 and obtained, you know, numbers where he could be reached.

15 Q Do you recall what that conversation was about?

16 A No, I don't.

17 Q Let me show you again another document from the file.

18 MR. NOLAS: We'll call it 14C, Your Honor.

19 THE COURT: Retrieve 14B and let Mr. McClain mark
20 that one before we lose it.

21 MR. NOLAS: Sure.

22 BY MR. NOLAS:

23 Q Let me just show you 14C, Mr. Muschott, and let me ask
24 you if you can identify that for us?

25 A Yes. This is a copy of a handwritten memo from my

1 file in my handwriting.

2 Q And could you relate to us -- does that document make
3 reference to Georganne Williams?

4 A Yes, it does.

5 Q Do you recall who Georganna Williams was?

6 A She was John Bush's girlfriend.

7 Q Did you talk to her before Mr. Bush's trial?

8 A Oh, yes.

9 Q Do you recall what you may have spoken to her about?

10 A Well, I spoke to Georganna several times and then she
11 was subsequently deposed, not by me.

12 Q You didn't attend her --

13 A Oh, I attended.

14 Q You did attend her deposition?

15 A Right.

16 Q Do you recall what she said at the deposition?

17 A I don't have independent recollection. She had gone
18 to the Martin County Jail and had spoken -- of course, she
19 had spoken to Mr. Bush, John Bush, but she also talked to
20 the other co-defendants.

21 And there were apparently some statements made to her
22 and there was concern among the defense attorneys that she
23 may become a person that the State Attorney would subpoena
24 for testimony about the statements that Mr. Bush and the
25 other defendants had made to her.

Q Did Mr. Parker, one of the co-defendants, make any statements to her as far as you recall?

A I think that he did make statements to her. I think that she did talk to Mr. Parker.

Q Do you remember -- and, again, this is -- see if you can place yourself back to the point in time prior to the trial. Do you remember finding out at that time that Mr. Parker told Miss Williams that he, in fact, was the person that fired the gun? That he made that admission to her in jail?

A I think he did.

Q Do you recall whether Miss Williams testified at Mr. Bush's trial?

A I frankly don't have an independent recollection of whether she did or not.

MR. NOLAS: Your Honor, could we stipulate that she, in fact, did? The record on appeal reflects that. If we can use that to refresh Mr. Muschott's recollection?

MR. BARTMON: Your Honor, if he wants to ask questions that the witness has said he doesn't independently recall, I don't know where we're going with that statement. The record will speak for itself on that subject.

THE COURT: Well, unless you need to establish that for a predicate for another question, that's something

you can --

MR. NOLAS: Yes, I do, Your Honor.

THE COURT: -- argue later. Is there any dispute about that, that she testified?

MR. BARTMON: I'm not disputing it, Judge, I just wondered where he was going --

THE COURT: Mr. Nolas says he needs to establish that as predicate for a question he's getting ready to ask. Go ahead and ask your question.

THE WITNESS: Does that refresh my memory?

MR. NOLAS: Yeah.

THE WITNESS: It does.

BY MR. NOLAS:

Q Now, at Mr. Bush's trial, you did not elicit from her that statement by Mr. Parker. Could you tell us why, if there is a reason, if you recall the reason?

A I don't have an independent recollection of the reason. I know that in handling the witnesses at the trial that there was concern about opening certain doors with respect to cross-examination. And I'm sure that if I didn't ask her that specific question, it was because I was concerned that it would have opened the door for redirect examination by the State that would have been detrimental to my client.

Q Now, do you recall specifically back then what the

1 reason may have been or are you just surmising this now by
2 looking at it back in time?

3 MR. BARTMON: Objection, Judge. I think he just
4 answered that question as to what his recollection was.

5 THE COURT: Overruled.

6 THE WITNESS: That is my best recollection. As I
7 recall now, of course, the State was not in a position to
8 prove that Mr. Bush had shot the victim because that was
9 not the evidence. And --

10 THE COURT: Did the State ever take the position,
11 either by argument or the presentation of evidence, that
12 Mr. Bush fired the gun?

13 THE WITNESS: No, Your Honor, they did not.

14 BY MR. NOLAS:

15 Q Mr. Muschott, don't you recall Mr. Stone arguing to
16 the jury, holding up a photograph of the victim, and
17 saying, "This is what happens when John Bush fires a .38
18 caliber bullet into her head"?

19 MR. BARTMON: Objection, relevancy and it's
20 beyond the scope of this hearing.

21 THE COURT: Well, it is, and also that was done
22 prior to the cross-examination of this witness that you're
23 talking about, Georganna -- or was done after the
24 cross-examination of this witness. So I don't think it
25 would be relevant. Objection is sustained.

1 MR. NOLAS: It was going to my next series of
2 questions, Your Honor.

3 THE COURT: I sustained the objection.

4 MR. NOLAS: Yes, Your Honor.

5 BY MR. NOLAS:

6 Q Did you call Miss Williams at the penalty phase?

7 A No, I did not.

8 Q Did you present at the penalty phase any evidence from
9 the co-defendants that Mr. Bush, in fact, was not the
10 trigger man?

11 A No, I did not.

12 Q Were you aware of what the co-defendants said about
13 this incident prior to the trial?

14 A Yes.

15 Q Would it be fair to say that, with the exception of
16 Mr. Parker's statements to the police, all of the other
17 co-defendants said that Mr. Parker was the shooter?

18 A Right.

19 Q And Mr. Parker, you already indicated, told Miss
20 Williams that he was the shooter?

21 A To the best of my recollection, he did. I think I
22 recall some real concern on the part of Mr. Parker's lawyer
23 when that occurred or shortly after that occurred.

24 Q I don't know if you remember that, in fact, was used
25 at Mr. Parker's trial, that account was used?

MR. BARTMON: Objection to relevancy.

THE WITNESS: I don't know what --

THE COURT: We don't need to --

MR. NOLAS: Withdraw, Your Honor.

BY MR. NOLAS:

Q Did you develop any evidence from the co-defendants' accounts to present at the penalty phase regarding the fact that Mr. Bush was not the shooter?

A Not the co-defendants' accounts, no.

Q Mr. Bush himself also said that he was not the shooter?

A Right.

THE COURT: Did he testify to that at the penalty phase?

THE WITNESS: I believe he did, yes, sir.

THE COURT: At the penalty phase, did the State ever take the position or argue that Mr. Bush fired the gun?

THE WITNESS: Not to the best of my recollection. Their position all along was that Mr. Bush's involvement was as a principal, but not the trigger man.

BY MR. NOLAS:

Q Now, Mr. Muschott, prior to the penalty phase, in the guilt/innocence closing argument, Mr. Stone had already argued that Mr. Bush was the shooter; do you recall that?

MR. BARTMON: Objection, relevancy. It's beyond the scope.

THE COURT: Well, it may be relevant as a carry-over because it was the same jury that heard the evidence in the guilt phase that heard it on the penalty phase. Go ahead.

MR. NOLAS: Yes, Your Honor.

THE WITNESS: That -- I think I recall that Mr. Stone may have said that in closing argument and I can't recall whether I elected to object to it at that time or whether I elected to respond to it in my portion of the closing by saying that that's contrary to what they have proved.

In other words, attacking the State's credibility with their own closing argument. I can't recall which strategy I used in response to that.

BY MR. NOLAS:

Q You used the word strategy. Do you recall specifically what you did with regard to that argument?

A Oh, you mean, holding up the photograph?

Q Yeah.

A No, I don't recall whether I objected or whether I used it against him.

Q At the time of Mr. Bush's trial, were you aware of any legal theory that you could have used to introduce the

1 account of the co-defendants, namely that Mr. Parker was
2 the shooter and not Mr. Bush?

3 THE COURT: Are you confining this to the
4 sentencing phase?

5 MR. NOLAS: Sentencing phase, Your Honor, yes.

6 THE WITNESS: Yes. I felt like I could have used
7 the accounts of the co-defendants in the sentencing phase.

8 BY MR. NOLAS:

9 Q By the way, let's go back to the records for a minute.

10 All the records that we've discussed, the jail records and
11 so on and so forth, was there a tactical or a strategic
12 reason for not obtaining those records?

13 A You're talking about the jail records and the DOC
14 records?

15 Q Jail records, school records, yeah. All that kind of
16 stuff we were talking about.

17 A No, there wasn't any strategic reason for not
18 obtaining those.

19 Q And the folks that we went through that you indicated
20 you didn't talk to prior to the trial, is there a tactical
21 or strategic reason that you recall for not talking to
22 those folks?

23 A No, not that I -- I didn't have any strategic reason
24 for not talking to them. Again, I have no independent
25 recollection of talking to the ones you mentioned to me.

1 But, you know, to the extent that my memory would be
2 refreshed, I may have spoken to some of them.

3 Q Okay. But, as we discussed when we went through the
4 list, there's no tactic you can say to the judge, "I chose
5 not to talk to them for this reason"?

6 A Right.

7 Q At the time of Mr. Bush's trial, did you investigate
8 and develop any evidence regarding his background in terms
9 of poverty, in terms of being a migrant worker, that kind
10 of stuff?

11 A Well, I familiarized myself with Mr. Bush's background
12 by talking to his father and his brother. And I -- there
13 was background information probably in the PSI. I don't
14 have any independent recollection of it.

15 Q And which PSI is this? I'm sorry.

16 A That would be the one on the prior incident. I didn't
17 -- when you say migrant family, the Bush family was a low
18 income family residing in Fort Pierce. The general local
19 definition of migrant families in that area are families
20 who are purely transitory. The Busnes had lived in that
21 area for years. They were harvesters. They worked in the
22 fields.

23 Q But they were farm workers and they moved around
24 picking various farm products?

25 A Well, they moved around from grove to grove, but they

1 didn't -- they weren't transients living a gypsy existence
 2 like what we tend to think of over there as purely migrant
 3 workers. They have no local residency whatsoever. The
 4 Bushes had a home. The father and then the mother had
 5 raised the family there. They had gone to school there.

6 Q Did you develop any evidence along those lines for
 7 presentation to the jury at the penalty phase?

8 A In terms of the background?

9 Q Yeah.

10 A No.

11 Q Let me show you another portion of the record.

12 MR. NOLAS: This is from the record on appeal,
 13 Your Honor, Exhibit 1.

14 BY MR. NOLAS:

15 Q And, Mr. Muschott, I have a copy for you. Mr.
 16 Muschott, this is a pretrial status conference conducted on
 17 Wednesday, June 9th, and then there is another part
 18 relating to Wednesday, June 30th, 1982.

19 And let me first just ask you to read the cover page
 20 and just tell us if that's accurate with regard to who the
 21 judge was and your presence and the presence of the
 22 co-defendants' attorneys.

23 A It's -- oh, okay. It is accurate.

24 Q Now, if you can, do you recall that status conference
 25 at all?

1 A I don't have an independent recollection of it other
 2 than it was before Judge Trowbridge and it was in Martin
 3 County.

4 THE COURT: Which one are you referring to? You
 5 mentioned the two dates, June 3rd and June 30th, I think.

6 MR. NOLAS: Well, I was going to turn to the June
 7 30th proceedings, Your Honor. They're combined in one
 8 portion, in one transcript.

9 BY MR. NOLAS:

10 Q Mr. Muschott, let me ask you to turn to Page 81.
 11 That's June 30th.

12 A My page numbers are chopped off here. Is that 1115 on
 13 the record?

14 Q Yes. And let me ask you to just turn to Line 18 of
 15 that and look that over to yourself. And then I'm just
 16 going to ask you a couple of questions about it.

17 A (Witness complies) Okay.

18 Q In that status conference, you requested that the
 19 Court appoint Dr. Tingle to examine Mr. Bush; fair?

20 A Yes.

21 Q And you indicated that you believed he had a
 22 psychiatrist working with him. I think you meant a
 23 psychologist.

24 A I did.

25 Q Do you recall the name of that psychologist?

1 A No, I don't, no.

2 Q Dr. Sobel? Does that refresh your recollection?

3 A Right.

4 Q Later on, in fact, Dr. Tingle and Dr. Sobel were
5 appointed in this case?

6 A That's correct.

7 MR. NOLAS: Excuse me, Your Honor.

8 BY MR. NOLAS:

9 Q And out of those two doctors, one is a psychiatrist,
10 namely Dr. Tingle, and Dr. Sobel is a psychologist?

11 A That is correct.

12 Q Did you have an opportunity to meet with Dr. Tingle
13 prior to Mr. Bush's trial?

14 A Yes, I did.

15 Q Do you recall what the date of that meeting was?

16 A I do not.

17 Q Let me show you, if I may -- I will withdraw that,
18 Your Honor. I will get to that in a moment.

19 Do you recall how long you spent with Dr. Tingle at
20 that meeting?

21 A Best of my recollection, half an hour to an hour.

22 Q If the voucher you submitted for cost reflects a half
23 an hour, any reason to dispute the accuracy of that?

24 A No.

25 Q Did you meet with Dr. Sobel at any point?

1 A I don't believe I did.

2 Q Do you remember specifically what you discussed with
3 Dr. Tingle at that meeting?

4 A I went over all the facts of the case and John's
5 background, everything that I had learned to date. I
6 reviewed with him the matters that I felt would be relevant
7 for his consideration and discussed with him whether there
8 would be any benefit in having him evaluate Mr. Bush and
9 having his associate, Dr. Sobel, do any evaluations.

10 Q Did you give Dr. Tingle any records regarding Mr.
11 Bush?

12 A I don't believe that I did.

13 Q Did you -- obviously, you wouldn't have given him the
14 background records which we discussed that you didn't have?

15 A Right.

16 Q Did you give him any police reports in this case
17 regarding what happened, what the co-defendants said, what
18 Mr. Bush said, any police reports?

19 A I don't recall giving him any police reports. I
20 discussed with him what all of the records contained and
21 that would have included the police reports and, of course,
22 the statements by the co-defendants as well as, you know,
23 statements by Mr. Bush.

24 Q Right. But other than your discussion with him, did
25 you give him any papers, anything written down?

1 A I don't recall giving him anything in writing.

2 Q Do you recall giving Dr. Sobel anything in writing?

3 A I didn't give him anything in writing.

4 Q Did you ask Dr. Tingle to have Dr. Sobel test Mr.

5 Bush?

6 A No, I didn't.

7 Q Did you ever have Mr. Bush psychologically tested,

8 given any psychological tests?

9 A No.

10 Q And other than Dr. Tingle and Dr. Sobel, would it be

11 fair for me to assume there were no other mental health

12 people involved in this case?

13 A That's true.

14 Q Did you ask Dr. Tingle to physically examine Mr. Bush,

15 to see him face to face?

16 A Physically examine? No, I didn't.

17 Q Did you ask that Dr. Sobel do that?

18 A No, I did not.

19 Q Did you specifically discuss with Dr. Sobel -- can you

20 relate to us what you specifically discussed with Dr.

21 Tingle in terms of -- I think you wrote a letter to him

22 reflecting competency, sanity, something along those lines.

23 Do you recall what the discussion was about?

24 A well, we discussed the -- what would have been

25 relevant to his consideration as a consulting psychiatrist.

1 In other words, whether, based on all the information that

2 had been developed in the case given to him through me,

3 there was anything that he could have done that would have

4 been of any benefit to Mr. Bush in defense of his case,

5 either in the guilt phase or in the sentencing phase and,

6 of course, the competency issue as well to stand trial in

7 the first place.

8 Q Now, if I were to tell you that that discussion with

9 Dr. Tingle took place in late August of 1982, could that

10 refresh that recollection? Is that relatively accurate as

11 far as you recall?

12 A That sounds about right.

13 Q I'm going to show you, Mr. Muschott, another document.

14 I believe this is -- these documents that I have been

15 showing you from the file, those are your handwriting; is

16 that --

17 A This is my handwriting, 14E.

18 Q Up on the upper right-hand corner, is that an

19 appointment card from Dr. Tingle?

20 A Uh-huh. Yes, it is.

21 Q And does that provide the specific day when you spoke

22 to him?

23 A It does appear to have that, August 27th.

24 Q And can you read to us what the rest of that note

25 says?

1 A "Susanne Sobel. Have Trowbridge order him up to Vero
2 for testing."

3 Q Was that -- what is that? What did you mean by that
4 note?

5 A To the best of my recollection, Dr. Tingle I think
6 indicated to me that if I wanted to him him just tested
7 strictly from an intellectual standpoint, that Miss Sobel
8 would be the one to do that and not he. That that was her
9 function within the group.

10 Q You say intellectual. Do you mean psychological
11 testing?

12 A I think intelligence testing.

13 Q Oh, intelligence testing. Okay. Did you ever discuss
14 brain damage testing with either Dr. Tingle or Dr. Sobel?

15 A No.

16 Q Did you ever discuss personality testing with them,
17 ask them about that?

18 A I'm sure I discussed that with Dr. Tingle. I don't
19 have an independent recollection of it.

20 Q Do you recall ever asking them what the significance
21 would be of different types of testing that can be given,
22 brain damage testing as opposed to personality testing as
23 opposed to intelligence testing?

24 A Dr. Tingle and I discussed intelligence testing and
25 personality testing. I don't think we discussed brain

1 damage testing.

2 Q And that note indicated that if you would like to have
3 testing done on Mr. Bush, you should request it. I think
4 it's Judge Trowbridge, have him produced?

5 A Right.

6 Q Could you read us what the other line says?

7 A The other line is, "Bush's past history of psychiatric
8 disorder."

9 Q Was that -- the way I read that is that's something
10 that you were going to get or --

11 A To determine if there was any.

12 Q Could you tell us the date on that note?

13 A It's not dated.

14 Q There is no date on it at all?

15 A There is a notation at the top, "Call second week in
16 September," but the memo itself does not have a date.

17 Q And so it was the second week in September that the
18 call would go through about having him tested and about
19 obtaining the prior records and that kind of stuff, prior
20 psychological records, whatever the note says?

21 MR. BARTMON: Objection. I think Mr. Nolas is
22 speculating about what that might mean. Why doesn't he
23 just ask the witness?

24 THE WITNESS: I don't think that's what --

25 THE COURT: He can answer.

1 THE WITNESS: No. If I recall correctly, 'cause
2 I had stapled Dr. Tingle's card on here --

3 MR. NOLAS: Right.

4 THE WITNESS: And the -- it may have been that
5 that appointment which obviously was given to me ahead of
6 time had to be rescheduled for one reason or another and
7 that call may have been to reschedule the appointment. I'm
8 just not sure about that. I don't think that note about
9 the second week in September pertains to having the testing
10 scheduled.

11 BY MR. NOLAS:

12 Q Okay. That was just a timing thing.

13 A Right. I think that's a scheduling note there to my
14 schedule.

15 Q And we already indicated that no testing was done and
16 you didn't get any papers to Dr. Tingle or Dr. Sobel?

17 A Right.

18 Q Dr. Tingle and Dr. Sobel were appointed as
19 confidential experts; is that correct?

20 A Yes. Uh-huh.

21 Q In other words, the State would have had no access to
22 anything they may have told you?

23 A Well, not unless we decided to use them.

24 Q Right. But other than that, the State would have had
25 no access to anything?

1 A Right.

2 MR. NOLAS: This is from the record on appeal,
3 Your Honor, so I won't mark it.

4 BY MR. NOLAS:

5 Q Mr. Muschott, let me show you this, a motion that was
6 filed by yourself on behalf of Mr. Bush. And let me ask if
7 you can identify that for us, please.

8 A This is a copy of a motion I filed for funds for
9 rehabilitation and criminology experts.

10 Q Can you relate to us what that was all about, what you
11 were interested in with regard to that motion?

12 A If I remember correctly, we all filed identical
13 motions. And --

14 Q By we all, you mean the four defense attorneys on
15 behalf of the four co-defendants?

16 A Right. And there was talk of trying to obtain an
17 expert that would have testified about rehabilitation.
18 This was specifically directed, you know, at the sentencing
19 phase.

20 Q Right. And when you filed that motion, were you
21 thinking in terms also of Mr. Bush's prior record, somebody
22 to explain that or anything like that?

23 A No. My recollection of this motion and what
24 discussion with other counsel at that time was that this
25 was something that was directed to the case as a death

1 penalty case per se and not so much Mr. Bush's prior
 2 record. And the thought at that time was that this expert
 3 -- the type of expert that was contemplated by this motion
 4 would be prepared to say that the death penalty was
 5 inappropriate because a person convicted regardless of the
 6 circumstances is capable of rehabilitation, that type of
 7 thing.

8 Q Now, if you can go back to that status transcript with
 9 me, I'll just ask you a couple of questions about where
 10 this motion was discussed.

11 A Okay.

12 Q And if you could please turn to Page 51, it's 1085,
 13 and turn to Line 19 of that, please.

14 A Okay.

15 Q Okay. And Mr. Fireson there is the attorney for one
 16 of the co-defendants; correct?

17 A Correct.

18 Q He withdraws a similar motion that he filed because
 19 his psychological expert, Dr. Vaughn, was also a
 20 criminologist. Is that a fair reading of that?

21 MR. BARTMON: Objection. I don't see what the
 22 relevancy of that is.

23 MR. NOLAS: Your Honor, let me have three
 24 questions and I'll tie it together.

25 THE COURT: Okay.

1 THE WITNESS: Yes.

2 BY MR. NOLAS:

3 Q And if you could please now turn to Page 79, it's also
 4 1113 through to the top of 1114, and just please read what
 5 you, yourself, speak at Line 22 through 3 of the next page.

6 A (Witness complies) Okay.

7 Q And at that point, you withdraw the motion that you
 8 filed for a criminologist?

9 A Right.

10 Q Dr. Tingle was not a criminologist; correct?

11 A No, he was not.

12 Q Do you recall why you withdrew that motion at that
 13 point?

14 A I don't have an independent recollection at this time.

15 Q Okay. In terms of Dr. Tingle and Dr. Sobel, was there
 16 a tactical or strategic reason for not giving them records?

17 A For not giving them records?

18 Q Yes.

19 A No.

20 Q Was there a tactical or strategic reason for not
 21 having Mr. Bush tested, psychologically tested?

22 A There was no strategic reason, no.

23 Q Was there a tactical or strategic reason if you recall
 24 for not having them see Mr. Bush?

25 A There was no strategic reason.

1 Q Either of the two doctors?

2 A Right.

3 THE COURT: Let's take a 10-minute break here.

4 (Recess at 11:00 a.m.; reconvened at 11:20 a.m.)

5 (Call to order of the Court)

6 THE COURT: You may continue, Mr. Nolas.

7 BY MR. NOLAS:

8 Q Mr. Muschott, did you discuss with Dr. Tingle the
9 statutory mitigating circumstance of an extreme emotional
10 disturbance at the time of the offense?

11 A I'm sure I did. I don't have an independent
12 recollection of it, but we went over all aspects which
13 would have included the statutory mitigating circumstances.

14 Q Okay. But do you recall specifically discussing with
15 him that statutory mitigating circumstance?

16 A I don't have an independent recollection of any
17 specific circumstance.

18 Q Do you have an independent recollection of discussing
19 with Dr. Tingle the statutory mitigating circumstance of
20 whether Mr. Bush's capacity at the time of the offense to
21 conform his conduct to the requirements of the law as
22 substantially impaired?

23 A I believe I recall the discussion of diminished
24 capacity.

25 Q Diminished capacity as a guilt/innocence defense or --

1 A As a mitigating circumstance.

2 Q Now, Dr. Tingle in an affidavit indicates that there
3 was some reference to a discussion of mental status at the
4 time of the offense, but that mitigating circumstances were
5 not specifically discussed. Is that --

6 MR. BARTMON: I would object to that as leading.

7 MR. NOLAS: I haven't concluded my question, Your
8 Honor.

9 THE COURT: The objection is overruled. The
10 question is all right, but start again. I missed the first
11 part.

12 MR. NOLAS: Yes.

13 BY MR. NOLAS:

14 Q Dr. Tingle in an affidavit indicates that there was a
15 discussion about mental status at the time of the offense,
16 but that mitigating factors were not specifically
17 discussed. Is there any explanation or --

18 A Well, I -- I'm sorry.

19 Q -- can you tell us about that?

20 A I'm sorry.

21 Q Go ahead.

22 A I'm not sure Dr. Tingle maybe fully understands or
23 fully understood the difference between the mitigating
24 circumstances and the circumstances that would go to the
25 guilt/innocence phase. We did talk about all three which

1 was competence, circumstances relating to guilt/innocence,
2 and mitigating circumstances.

3 Q Did you explain to him what the mitigating
4 circumstances are, lay it out for him, give him copies of
5 cases, things along those lines?

6 A I didn't give him copies of cases. I just, you know,
7 went over with him what the statutory mitigating
8 circumstances were, and then, you know, reviewed what
9 background information I had about John, even beyond the
10 statutory circumstances.

11 Q Did you ever do any of that with Dr. Sobel?

12 A No.

13 Q You indicated he may not have understood what the
14 mitigating circumstances were?

15 A Well, I think he understood the mitigating
16 circumstances. I'm not sure that he makes the distinction
17 that it's two separate phases of the same case. He may
18 consider it all lumped together.

19 Q Did you get him to understand that or try to get him
20 to understand that?

21 A Well, he understood it, I think, for the purpose of
22 our communication, you know, that it related to two
23 different aspects of the same case.

24 Q Other than that half hour discussion, did you talk to
25 him at any other point?

1 A I don't have any independent recollection of having
2 any other conferences with him. I may have spoken to him
3 on the phone on one or two occasions.

4 Q But other than that half hour discussion, you don't
5 recall anything now?

6 A No, I don't. I don't have an independent
7 recollection, no.

8 Q At the penalty phase of Mr. Bush's trial, I believe
9 you argued certain mitigating circumstances. Age, for
10 example. Do you remember how many statutory mitigating
11 circumstances you asked for instructions on or tried to
12 present?

13 A I think I asked for instructions on four or five.

14 Q Do you recall what those were?

15 A I don't today, no. Age was one of them, I know. I
16 don't recall what the other ones were.

17 Q Would it be fair to say that at the penalty phase of
18 Mr. Bush's trial, you were trying to do the best you could
19 with what you had?

20 A That's fair.

21 Q If you had mitigating evidence beyond what you had at
22 the time, would it be fair to say that you would have
23 presented that to Mr. Bush's jury?

24 MR. BARTMON: Objection. That's kind of general
25 conclusory. It calls for speculation.

THE COURT: The objection is overruled.

THE WITNESS: I would have used it if I had thought that it was -- you know, that it had more good than detriment in it.

BY MR. NOLAS:

Q If you had mitigating evidence that Mr. Bush's capacity was substantially impaired, would you have presented that type of evidence?

A If I had felt that it was sufficiently demonstrative that that outweighed what the State would have used, you know, in rebuttal, I would have used it.

Q If you had had expert testimony in that regard that would have established that circumstance, would you have used that?

A I may have used it. It would have depended on how -- to what degree I would have felt it would have impressed the jury versus the detrimental effect of what the State would have brought back in rebuttal.

Q And in terms of the capacity --

THE COURT: That's a calculation you have to make with almost any piece of evidence, isn't it?

THE WITNESS: Yes, sir. Absolutely.

BY MR. NOLAS:

Q In that regard, Mr. Muschott, with regard to that capacity and mitigating circumstance, extreme emotional

disturbance, would it be fair to say that on those two, you didn't have any evidence about that?

A That I didn't have any evidence?

Q Right. To support those two mitigating circumstances.

A Extreme emotional disturbance and diminished capacity?

Q Yes.

A That's true.

Q And so at the time back in 1982 you didn't make a decision not to present that, you just didn't have anything to present along those lines; is that fair?

A Well, you know, I had tried to determine whether there was any evidence that could be developed on those mitigating circumstances that would have, in my view, outweighed the detrimental effects of what the State would have in all likelihood presented in rebuttal to that.

So, the answer to the question, I guess, is I had not been able to develop anything on either of those two mitigating circumstances that I felt outweighed the detrimental effect of what the State would have presented in opposition.

THE COURT: What were you concerned that the State would have presented? Can you discuss that generally?

THE WITNESS: Well, I was concerned with what the State would have presented in terms of, I think, number

one, facts and circumstances surrounding the prior offense.

And possibly --

THE COURT: That's the conviction for rape and kidnapping?

THE WITNESS: Yes, sir.

THE COURT: All right. At this stage of the trial, that is the sentencing phase, how much had the jury and the Court learned about that offense? Do you remember?

THE WITNESS: Just what is reflected on Exhibit A, that he was convicted of that crime.

THE COURT: They didn't have any of the details, though?

THE WITNESS: Right. Of course, they had that in the sentencing phase, not in the guilt phase. At the close of the State's case on the sentencing phase, that's all they had.

THE COURT: Okay.

BY MR. NOLAS:

Q At the sentencing phase, they also had the closing argument, the State's closing argument?

A Right.

Q And that closing argument referred to the fact that it was a brutal rape, a brutal robbery, that Mr. Bush was sentenced to 30 years, but was nevertheless paroled, that it was a horrendous offense, that the jury should not let

it happen again, and also --

THE COURT: They had that at the --

MR. NOLAS: At the penalty phase, Your Honor.

THE COURT: I thought you just said the guilt phase. Maybe I misunderstood.

MR. NOLAS: No. If I said guilt, I meant penalty, Your Honor.

BY MR. NOLAS:

Q Do you recall that argument presented by Mr. Stone regarding that prior --

A I don't have an independent recollection, but if that's what the record reflects, you know, I don't have any reason to dispute that.

THE COURT: Well, that's because Mr. Bush testified, isn't it? He wouldn't --

THE WITNESS: Well, in part, that's true, because we had -- that's correct.

BY MR. NOLAS:

Q Mr. Muschott, they did admit the judgment of conviction and the sentencing on --

A Yes, they did.

Q And they presented the parole officer who talked about that case as well; correct?

A I believe they did present the parole officer.

Q And they presented another witness. I believe it was

1 a law enforcement officer who referred to that case.

2 A During the sentencing phase?

3 Q Yeah.

4 A That I don't specifically recall. If I hear his name,
5 it might refresh my memory.

6 Q Okay. Well, we can just let the record speak for
7 itself on that.

8 A Right.

9 Q And the State put that on before Mr. Bush testified?

10 A That's right.

11 THE COURT: Was it your position, Mr. Nolas, that
12 that evidence that you just alluded to, the bare conviction
13 or judgment of conviction and whatever other evidence that
14 they presented would have been sufficient to permit the
15 prosecutor to argue details of the rape and robbery?

16 MR. NOLAS: Yes, he did, Your Honor.

17 THE COURT: I know he did, but based on the
18 evidence that they presented or based on evidence that was
19 obtained through cross-examination of Mr. Bush?

20 MR. NOLAS: My understanding and I'm sure there
21 will be a debate on this with Mr. Bartmon, is that that was
22 based on what the State presented. They were going to do
23 that --

24 THE COURT: Well, that's something that may be
25 important, but the record, as you say, will permit me to

1 conclude what needs to be concluded in that regard. But
2 I'd like your view, Mr. Bartmon's view about that at some
3 later stage of this proceeding.

4 MR. NOLAS: Yes, Your Honor.

5 BY MR. NOLAS:

6 Q Now, at the time of Mr. Bush's sentencing in 1982, is
7 it fair to say that you had not developed at that point or
8 did not have at that point any mental health mitigating
9 evidence, any expert testimony along those lines?

10 A Had not developed anything, that's correct.

11 Q So, at the time, you didn't do a weighing process,
12 should I put this on, should I not put this on, in that
13 regard?

14 A ~~Well~~, I had done that weighing process prior to the
15 sentencing phase of the trial.

16 Q Right. But I guess my point is, you couldn't weigh
17 something you didn't have?

18 A Well, I couldn't have something I couldn't develop.
19 I just at that point had not, that I would determine, been
20 able to develop anything that I saw was going to lead to
21 outweighed what would have come in on the coattails of that
22 from the State.

23 Q But would it be also fair to say that you don't know
24 what the results of testing would have reflected back then?

25 A I don't know with certainty.

Q And the testing could very well have outweighed the detrimental effect or could not have?

MR. BARTMON: Your Honor, that's sort of speculation here.

THE COURT: Well, it's a matter of argument. That's an argumentative question.

MR. NOLAS: I'm sorry, Your Honor, I --

THE COURT: I said that's an argumentative question. You can -- he's testified about that.

BY MR. NOLAS:

Q Do you recall Mr. Bush testifying as to his remorse at the sentencing phase?

A His live testimony?

Q Yeah.

A I recall his live testimony. I don't recall any specific remarks about remorse.

Q If the record reflects that you didn't argue anything along the lines of remorse, is there any tactical decision that you recall now that you can relate to us in that regard?

MR. BARTMON: Objection. It assumes facts not in evidence.

MR. NOLAS: The record on appeal has been in evidence forever, Judge.

THE COURT: Well, if that's a fair

characterization.

MR. BARTMON: Let me rephrase it. It is not a fair characterization. It's an argumentative question from that standpoint.

THE COURT: Well, if you want to assume -- ask him to assume that he didn't argue remorse, that puts a burden on you to convince me or the trier of fact at some point that he did not --

MR. NOLAS: Sure.

THE COURT: -- for this question to have any probative value or any answer that he may give. But you may answer the question.

THE WITNESS: I don't recall not arguing remorse.

BY MR. NOLAS:

Q Did you develop any evidence to explain the prior offense in 1974 to the jury?

A No.

Q Did you develop at the time any evidence regarding what happened to Mr. Bush during his incarceration?

A For the prior offense?

Q Yeah.

A No.

Q Were you aware of what happened to Mr. Bush during that period of time?

A Only from what he told me.

1 Q Were you aware of the fact that he was molested and
2 raped on a number of occasions?

3 A He told me he had problems in prison of that type.

4 Q Were you aware of that fact that he was 15 years old
5 and he was incarcerated in an adult prison?

6 A Right.

7 Q And I think we can all agree that Mr. Bush is a small
8 person?

9 A That's correct.

10 Q Did you develop any evidence along those lines for
11 presentation at the penalty phase?

12 A No, I did not.

13 Q Do you recall what the jury vote was?

14 A Seven to five.

15 Q Prior to the trial, did you become aware of the fact
16 that the four co-defendants had indicated there was some
17 drinking that had gone on that night and some use of
18 marijuana?

19 A I remember the drinking. I don't specifically --
20 yeah. Okay, I remember the marijuana, too, right.

21 Q Did you develop any evidence along those lines for
22 presentation at the penalty phase?

23 A No.

24 Q Did the State have a strong case against Mr. Bush in
25 your opinion?

1 A Actually for the guilt/innocence phase?

2 Q On the guilt/innocence phase.

3 A Oh, yeah. Yes.

4 MR. NOLAS: If I can have just a moment, Your
5 Honor.

6 (Pause in the proceedings)

7 MR. NOLAS: If I could have the Court's
8 indulgence for one moment, Judge.

9 (Pause in the proceedings)

10 BY MR. NOLAS:

11 Q Mr. Muschott, assume you had evidence of low
12 intelligence regarding Mr. Bush, that he was a person of a
13 borderline level of intellectual functioning, how would the
14 State rebut that type of evidence for the 1974 offense? In
15 other words, putting yourself back in that point in time,
16 could the State have rebutted that by using the prior
17 offense?

18 A To the extent that they would have shown or attempted
19 to show that Mr. Bush was the leader in that situation
20 which, of course, they had attempted to show was the
21 scenario in the case that I was trying. And that certain
22 things that occurred in that case were done at his
23 suggestion or by his direction.

24 THE COURT: Now, that case, you're referring to
25 the --

1 THE WITNESS: Prior case.

2 THE COURT: -- the rape and robbery.

3 BY MR. NOLAS:

4 Q Do you recall what, if anything, in the prior case was
5 done at Mr. Bush's suggestion?

6 A There was a dispute in that case as to whose idea it
7 was to commit the offense, how the thing got started in the
8 first place. To the best of my recollection, as usually is
9 the case in a co-defendant situation, there were varying
10 accounts of who really was the initiator. And I believe
11 there was an account that put the burden on Mr. Bush.

12 Q And you got this from the file that you looked at?

13 A Well, that and also from speaking with Richard Schopp
14 who had tried the case.

15 Q But you never did review the Youth Services records
16 about that case?

17 A No. Well, no, I didn't review those other than what
18 would have been in the PSI.

19 Q What about brain damage? Did the State have any
20 mental health evidence to rebut that kind of stuff, brain
21 damage, low intelligence, anything along those lines?

22 A In the sentencing phase of my case?

23 Q Yeah.

24 A Well, yeah, they would have used some of the
25 information about actions or statements by Mr. Bush that

1 would have indicated that he was, you know, functionally
2 normal during the offense that I was trying.

3 Q In this case?

4 A Right.

5 Q But they used that anyway?

6 A Not all of it.

7 Q Could you tell us what it was that they didn't use?

8 A Well --

9 MR. BARTMON: Objection. I think the record will
10 speak for itself on that point.

11 MR. NOLAS: Well, the record won't speak as to
12 what they didn't use.

13 BY MR. NOLAS:

14 Q Can you tell us what they didn't use?

15 A Well, there were statements by the co-defendants about
16 Mr. Bush's participation that were at odds with his
17 statements. And, of course, his statements went in and
18 theirs didn't. And, again, the blame -- much of the blame
19 was placed on him by the co-defendants, although the State
20 never took the position that he pulled the trigger.

21 Q Specifically, other than Parker's statement which the
22 State tried to use anyway, can you tell us what any of the
23 other co-defendants said that made Mr. Bush the leader?

24 A I can't recall specifically, but I know there were
25 statements by Parker and at least one other co-defendant

1 that indicated that, you know, he was the leader and
2 statements about whose idea it was to kill the victim.

3 Q But do you recall specifically who said that,
4 something that we can look at?

5 A I don't have a specific recollection, no.

6 Q And the State did try to use Parker's statement?

7 A Right. Tried to use it.

8 MR. NOLAS: I have nothing further, Your Honor.

9 THE COURT: You may cross-examine, Mr. Bartmon.

10 CROSS-EXAMINATION

11 BY MR. BARTMON:

12 Q Mr. Muschott, you were court appointed in this case,
13 were you not?

14 A Yes, sir.

15 Q The case we're on this morning? Could you tell us a
16 little bit about the circumstances under which that
17 occurred?

18 A I received a telephone call from Judge Trowbridge who
19 asked me if I would be willing to be appointed to this
20 case. And he had specifically called me requesting whether
21 I would volunteer because it was a Martin County case. I
22 was on the Special Public Defender appointment list in
23 St. Lucie County, but the lists are maintained by county.
24 So, my being appointed outside my county required my
25 volunteering for the case.

1 Q Had you appeared before Judge Trowbridge before in
2 either a civil or criminal matter?

3 A Yes.

4 Q Did you have criminal trial experience prior to the
5 time you represented Mr. Bush in 1982?

6 A Yes, I did.

7 Q Would you tell us the nature of that noncapital
8 criminal experience first?

9 A Prior to 1982, I had been on the Special Public
10 Defender appointment list since about 1976 and averaged
11 about two to three criminal trials per year between '82 and
12 '86.

13 Q Had you represented defendants in capital cases prior
14 to Mr. Bush?

15 A Yes.

16 Q Do you recall the names of the defendants that you
17 represented?

18 A I represented a young man named Jeffrey Stanley. I
19 represented a man named Earl Footman. I represented a
20 woman. I can't recall her name. And I believe that those
21 were the first degree murder cases and capital cases that I
22 had been involved with prior to this case.

23 Q Were you familiar -- so, then, at the time you
24 represented Mr. Bush, you were familiar with the statute,
25 the death penalty statute, aggravating circumstances, both

1 statutory and nonstatutory mitigating circumstances?

2 A Yes.

3 Q Do you recall -- I think you had stated that Mr.
4 Schopp was initially -- was he initially appointed to
5 represent Mr. Bush?

6 A Yes, he was.

7 Q Do you recall the circumstances under which you were
8 appointed to replace him?

9 A Mr. Schopp had represented Mr. Bush in the first -- in
10 the rape case in '74. And because of the outcome of that
11 case, apparently Mr. Bush was not satisfied with Mr. Schopp
12 and asked for another lawyer. And that was when I was
13 appointed.

14 Q Okay. This was a high publicity case when it came to
15 light, wasn't it?

16 A Yes.

17 Q This was tried by the prosecutor in Martin County and
18 his chief deputy?

19 A Well, it was tried by the State Attorney for the
20 Nineteenth Judicial Circuit. At that time, it was Bob
21 Stone and he was the State Attorney for the Nineteenth
22 Circuit which is Indian River, St. Lucie, Okeechobee, and
23 Martin Counties.

24 And his chief assistant in St. Lucie County -- well,
25 he had two chief assistants, Bruce Colton and Jimmy

1 Midelis. And all three of them tried the case together.

2 Q Were you familiar with Mr. Stone and Mr. Midelis as
3 prosecutors? You would call them experienced prosecutors,
4 would you not?

5 A Yes.

6 Q Experienced in capital cases, to your knowledge?

7 A Yes.

8 Q No question you were up against heavyweight
9 competition from the standpoint of capital case experience?

10 A Absolutely.

11 Q Did you analyze this case as a death penalty case from
12 the beginning?

13 A Yes. There was no doubt in my mind.

14 Q Was that based on the facts as you understood them in
15 terms of Mr. Bush's involvement and the facts and
16 circumstances of the murder and the crimes themselves?

17 A Yes.

18 Q Did you have an investigator in this case appointed
19 for you by the Court?

20 A Yes, I did.

21 Q Do you recall who that was?

22 A Hershel Thompson.

23 Q Had you worked with Mr. Thompson before?

24 A Yes, I had.

25 Q Could you tell us anything about your knowledge of his

1 experience that led you to want him to be your
2 investigator?

3 A I had worked with Mr. Thompson since about 1976 and I
4 first came to use him because of his credentials. He was a
5 private investigator at that time, but his past experience
6 included 18 years of law enforcement with the Martin County
7 Sheriff's Department and later with the St. Lucie Sheriff's
8 Department. And he had served as a road officer and also
9 as a detective.

10 And the last several years, he had served as a
11 detective. He had worked closely with the State Attorney's
12 Office in a number of cases when he was with law
13 enforcement. And he had been in private investigation
14 field for several years and he was a licensed polygraph
15 operator. So I considered Mr. Thompson to be thoroughly
16 qualified as an investigator.

17 Q Now, you met with the defendant prior to the
18 sentencing phase?

19 A Yes.

20 Q Do you recall approximately how many times you might
21 have met with him?

22 A Prior to the sentencing phase.

23 Q Uh-huh.

24 A Well, of course, we were seeing each other on a daily
25 basis at trial.

1 Q I mean, including all of those conferences. I mean,
2 in total before the sentencing.

3 A Oh, wow. In excess of 20 times.

4 Q Did Mr. Thompson, your investigator, also meet with
5 the defendant?

6 A Yes, he did.

7 Q Did he report back to you when he met with the
8 defendant concerning whatever Mr. Bush and himself had
9 discussed?

10 A Yes, he did.

11 Q So you were aware not only from your own impressions,
12 but from your investigator's conversations with Mr. Bush,
13 there were meetings involving your investigator that you
14 were aware of as well?

15 A Yes, that's correct.

16 Q Would you say you had a good relationship with Mr.
17 Bush?

18 A I think we did, yes.

19 Q Did you ever have any trouble communicating with Mr.
20 Bush?

21 MR. NOLAS: Objection, Your Honor.

22 THE COURT: What is your objection?

23 MR. NOLAS: My objection is Your Honor has denied
24 us a hearing on the competency question and I think Mr.
25 Bartmon is --

1 THE COURT: For what?

2 MR. NOLAS: Your Honor has denied us a hearing on
3 the competency issue and I don't think it's appropriate --

4 THE COURT: I think that's going to -- that
5 question is not going to that issue. Objection is
6 overruled.

7 THE WITNESS: No, I never had a problem
8 communicating with John.

9 BY MR. BARTMON:

10 Q Did you explain the felony murder concept? Did you
11 discuss that with Mr. Bush?

12 A Oh, yes, from the beginning.

13 Q So you explained to him that whether or not he pulled
14 the trigger, he could still be found guilty and sentenced
15 to death for this crime?

16 A Yes.

17 Q In your mind, did he understand that?

18 A Yes.

19 Q Based on your impressions of the facts of this case as
20 you knew them and your impressions gained from contact with
21 the defendant, how would you describe him as a person?

22 A As a person?

23 Q Yeah.

24 A Well, he struck me as very cold. He -- you know, I
25 felt that he had average intelligence. The manner in which

1 he discussed the facts of the case and what transpired was
2 very dispassionate. And that left me with an impression.

3 Q He didn't impress you as someone then in discussing
4 the facts of the case that had remorse for what he did?

5 A No.

6 Q Is it not important in a capital case in determining
7 strategy in the sentencing phase to consider what your own
8 impressions of the defendant are?

9 A Oh, yes.

10 Q Would you consider that rather significant
11 information?

12 A Oh, yes, absolutely.

13 Q In other words, if you're getting a certain
14 impression, you've got to consider whether the jury will as
15 well?

16 A Right. Exactly.

17 Q You had conversations with the co-defendants'
18 attorneys in this case; correct?

19 A Yes, I did.

20 Q You were aware from those conversations at least to
21 some extent what the co-defendants were saying about Mr.
22 Bush's involvement?

23 A Exactly. Right.

24 Q Did Mr. Bush ever give you the impression he was
25 afraid of any of the other co-defendants?

1 A NO. NO.

2 Q What was your view based on your review of the facts
3 prior to the sentencing phase of Mr. Bush's role in these
4 three crimes?

5 A What was my view of his role in these three crimes?

6 Q Yes.

7 A Well, I felt that he was --

8 THE COURT: Did you say in these three crimes?

9 MR. BARTMON: I'm saying -- by the three crimes,
10 I mean the robbery, the kidnapping, and the murder, the
11 three convicted crimes in this particular case.

12 THE WITNESS: I felt that the facts demonstrated
13 or indicated to me or left me with the impression that Mr.
14 Bush was the leader of the group, or certainly the best
15 case scenario from his standpoint, at least the co-leader
16 with Parker. But I felt really that he was the lead
17 person.

18 Q And that was based not only on the facts as you
19 understood them from your client, but your review of all
20 the evidence including the co-defendants' statements?

21 A Right.

22 Q Did he strike you at any time either under your
23 impression of the facts or your impression of him
24 personally as a passive or timid person?

25 A No.

1 Q would submissive be a word you would use to describe
2 him under those circumstances?

3 A No, he was very -- he was aggressive. In fact, on one
4 occasion, he called me down to the Martin County Jail and
5 asked me to look into his automobile because he was
6 concerned about his automobile which was impounded. And I
7 always responded to his calls when he wanted me to come and
8 see him. And, of course, I had no way of communicating
9 with him directly until I got to the jail, so I didn't know
10 what the nature of the call was.

11 But he was very adamant about certain things he wanted
12 looked into with respect to his car. Mr. Bush was never
13 hesitant to communicate with me about the case or about any
14 other matters that he felt needed attention from me or
15 anybody else.

16 Q So, in fact, your impression was he was exactly the
17 opposite of a timid person, wasn't he?

18 A Right.

19 Q Would your assessment of him as an aggressive person,
20 certainly wouldn't that be important in terms of now you
21 might think he might come across at the sentencing phase?

22 A Oh, absolutely.

23 Q When you decided -- when you were approaching
24 sentencing phase, you obviously knew the same jury had just
25 convicted him of the crimes. Okay. From a strategy

1 standpoint, you don't want to make the defendant look any
2 worse at that point since the jury has just convicted him,
3 do you?

4 MR. NOLAS: Objection, Your Honor.

5 THE COURT: What's your objection?

6 MR. NOLAS: I'm objecting to the characterization
7 of something as a strategy. He should have Mr. Muschott
8 explain that.

9 THE COURT: Well --

10 MR. BARTMON: I mean, he's asked him about
11 various aspects of his representation and I'm cross-
12 examining him on the same aspects.

13 THE COURT: That's what he's doing. Objection is
14 overruled.

15 BY MR. BARTMON:

16 Q You certainly have no interest in making him look
17 worse at the sentencing phase?

18 A No, absolutely not.

19 Q Isn't it also important in every decision you make
20 about mitigation and evaluating it as to whether or not
21 it's going to, quote, unquote, "open the door," for the
22 State to bring in negative information?

23 A Right. Exactly.

24 Q You were familiar with that aspect of representation
25 that if you brought in certain evidence, the State then may

1 walk through the open door with things that may make the
2 defendant look worse than he already is?

3 A Right.

4 Q That's certainly a crucial consideration in terms of
5 sentencing phase, isn't it?

6 A Absolutely.

7 Q Did you consider it important for you to maintain
8 credibility with the jury at sentencing phase?

9 A I felt that was primary.

10 Q Would it be fair to say that it is a rather
11 destructive thing from the standpoint of credibility with
12 the jury to switch strategies from the trial phase to the
13 sentencing phase?

14 A Yes.

15 Q So it would not be particularly helpful in your view
16 to introduce information which may be totally contradictory
17 to the strategy used in guilt phase?

18 A Right.

19 Q Do you recall in your closing argument urging the jury
20 to listen to some of the latter statements of Mr. Bush to
21 where he had expressed some sense of misgivings about what
22 he did?

23 A Yes, I did. That was actually the cornerstone of my
24 closing argument.

25 Q Which was, if you could elaborate? Could you

1 elaborate on that?

2 A Yeah. He had given four tape-recorded statements to
3 the police. And in the third statement -- and, of course,
4 I had had an opportunity not just to review the
5 transcripts, but to listen to the tapes. In three of the
6 tapes, he sounded hostile and cold about the incident. And
7 I just got a bad feeling myself listening to them.

8 But in the third tape, that third statement that he
9 gave, he really sounded remorseful. And in describing that
10 tape, I always use the word hangdog. He just felt --
11 sounded like he felt real bad about what had happened.

12 That tape was in evidence along with the other four
13 and I asked the jury in closing argument to listen to that
14 tape in the jury room before they made a decision and
15 before they voted.

16 And, indeed, after closings were completed and the
17 instructions were given, the first thing they did when they
18 went back there is they asked for the third tape and a tape
19 recorder. So they did to that extent go along with at
20 least my request in closing argument.

21 Q Had you discussed with Mr. Bush your -- that this was
22 going to be your approach and strategy in terms of closing
23 argument at sentencing?

24 A Oh, yes.

25 Q He was aware of that?

1 A Right.

2 Q Initially, did he have any problems with that that he
3 expressed to you?

4 A No. We have numerous discussions about whether he
5 would testify at the penalty phase. And --

6 Q I mean -- I want to get to that point, but initially
7 there were --

8 A Oh, he had no problems with that.

9 Q -- discussions and you did have discussions along
10 these lines with him?

11 A Right. Yeah, I told him I wanted to ask the jury to
12 play the third tape and that I thought that was the one in
13 which he really sounded remorseful.

14 Q Do you recall at the closing argument arguing to the
15 jury that -- or suggest to the jury that Mr. Bush would be
16 a rather older person when he would be first eligible for
17 parole?

18 A Right. I did. I told them that basically his fate
19 was sealed and I tried to do that as dramatically as I
20 could. And, of course, my thought there was to tell the
21 jury you've done your job now with respect to Mr. Bush.
22 You know, you don't need to go any further with the thought.

23 THE COURT: Let's break for lunch now. Please
24 return at 1:30.

25 (Recess at 12:00 p.m.; reconvened at 1:35 p.m.)

1 chance of that death penalty being overturned on appeal if
2 it was imposed over a life recommendation. So we felt that
3 if and when our cases reached the sentencing phase that it
4 would be important to do everything possible to obtain a
5 life recommendation from the jury.

6 Q When you -- you stated before you were familiar with
7 the prosecutors in this case. Did you believe that the
8 prosecutors were aware of the facts of the prior 1974 crime
9 where Mr. Bush was convicted of rape and robbery?

10 A Oh, yes, they were fully aware of that. Their office
11 prosecuted that case. That was the St. Lucie County case.

12 Q Was it your belief at that time that there might be a
13 certain evidence that the State might try to present at
14 sentencing that they may not try to present at guilt phase?

15 A Yes. Yes. I felt that depending on what we attempted
16 to present at sentencing that the State may attempt or
17 would have attempted to introduce evidence of the details
18 of that crime as evidence which would have been, in my
19 view, extremely detrimental from the defense standpoint in
20 the sentencing phase.

21 Q You were aware of the facts, I think you testified, in
22 that case from speaking with Mr. Schopp?

23 A Yes.

24 Q He was the defense attorney for Mr. Bush in that prior
25 crime?

1 sentencing phase. I also knew that the State Attorney's
2 Office was going to try every possible way to get that
3 evidence in if we left them any avenue.

4 Q So your feeling was, given all the circumstances of
5 that case as you knew it and the factual parallels in terms
6 of the victim and the type of crime involved, would be
7 disastrous in terms of impact at sentencing?

8 A Yes.

9 Q You talked -- did you talk to Mr. -- you related that
10 you had conversations with Mr. Bush's father and his
11 brother. Were they aware -- did you discuss with them
12 mitigating circumstances?

13 A Yes, we discussed the mitigating circumstances. And I
14 went over the statutory mitigating circumstances with them,
15 together with the fact that any other evidence was
16 admissible on that issue. And I basically asked them if
17 there was anything that they felt that they knew of that
18 could be offered in that regard.

19 Q Do you recall what they responded to you on that?

20 A Neither of them could offer me anything that would
21 have been of any benefit to John Bush at the sentencing
22 phase.

23 Q Was either one of them willing to testify at the
24 sentencing phase as you recall?

25 A I told both of them that they could testify if they

1 A That's correct.

2 Q Can you recall the nature of the facts of the crime as
3 he related it to you?

4 A As he related it to me, it was a horrendous abduction
5 and rape. And that the female victim was traumatized, not
6 necessarily physically -- she was physically, traumatized --
7 but mentally to the point that some two or three years
8 after the incident she was still under psychiatric care.

9 And that there were details of that crime which if
10 presented by the State Attorney's Office, in my view, would
11 have been devastating in the sentencing phase of the case
12 to which I was appointed, particularly in light of the
13 degree in which there were similarities, the abduction of a
14 white female, and that type of thing, kidnapping.

15 Q Based on that assessment, you didn't want any part of
16 that conviction coming in beyond the fact of that
17 conviction, did you, in the sentencing phase?

18 A Exactly. I knew that they were entitled to get the
19 fact of the conviction in and that they knew they were
20 going to get that in. I felt that it was in the best
21 interest of my client to hold it to that absolute bare
22 minimum.

23 And I felt that anything that I did that would have
24 risked in any way opening the door to the State to get the
25 details of that crime in would have been disastrous in the

1 sentencing phase. I also knew that the State Attorney's
2 Office was going to try every possible way to get that
3 evidence in if we left them any avenue.

4 Q So your feeling was, given all the circumstances of
5 that case as you knew it and the factual parallels in terms
6 of the victim and the type of crime involved, would be
7 disastrous in terms of impact at sentencing?

8 A Yes.

9 Q You talked -- did you talk to Mr. -- you related that
10 you had conversations with Mr. Bush's father and his
11 brother. Were they aware -- did you discuss with them
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13 A Yes, we discussed the mitigating circumstances. And I
14 went over the statutory mitigating circumstances with them,
15 together with the fact that any other evidence was
16 admissible on that issue. And I basically asked them if
17 there was anything that they felt that they knew of that
18 could be offered in that regard.

19 Q Do you recall what they responded to you on that?

20 A Neither of them could offer me anything that would
21 have been of any benefit to John Bush at the sentencing
22 phase.

23 Q Was either one of them willing to testify at the
24 sentencing phase as you recall?

25 A I told both of them that they could testify if they

1 wished if there was something positive that they had to
 2 offer and gave them the opportunity. It's my recollection
 3 that neither one of them wanted to testify. And, if I
 4 remember correctly, I think that John had told me at one
 5 time that he did not want his father to testify, but I felt
 6 that was simply that John did not want to put his father
 7 through the emotional ordeal of testifying under those
 8 circumstances. So I explained to him that if, indeed, his
 9 father had anything to offer that we would have to consider
 10 that as opposed to, you know, his wishes for his father's
 11 emotional condition. But as it turned out, neither one of
 12 them had anything to offer.

13 Q Did you ever have any problems talking to either one
 14 of them?

15 A No.

16 Q Did you talk to them whenever they wanted you to?

17 A Yes.

18 Q Did you ever refuse to meet with either one of them,
 19 the brother or the father?

20 A No.

21 Q I would like to ask you a little bit about the
 22 circumstances under which Mr. Bush testified at the
 23 sentencing.

24 A Okay.

25 Q As I understand it from the record, do you recall that

1 you after his testimony advised the Court that you had
 2 advised Mr. Bush not to testify at sentencing.

3 MR. NOLAS: I object to the leading form of the
 4 question, Your Honor. This is beyond the scope of direct.
 5 If Mr. Bartmon wants to call this witness in that regard, I
 6 have no objection to that, but it should not be done in a
 7 leading manner.

8 THE COURT: The objection is overruled.

9 MR. NOLAS: Thank you, Your Honor.

10 THE WITNESS: Yes. I'm sorry. I forgot the
 11 question.

12 BY MR. BARTMON:

13 Q Do you recall having put on the record after Mr. Bush
 14 testified at sentencing that it had been your
 15 recommendation to him not to testify at sentencing?

16 A Yes. I recall doing that.

17 Q You did, in fact, advise him not to testify?

18 A Yes, I did.

19 Q Could you elaborate on the circumstances under which
 20 you advised him of that?

21 A Yes. After we had developed all the facts in the case
 22 and after the guilt phase was completed, I had, of course,
 23 in my mind how I was going to handle or recommend to Mr.
 24 Bush, to John, how we handle the sentencing phase, even
 25 during the guilt phase.

1 And we had discussed the sentencing phase during the
2 guilt phase. And I had listened to this third tape in
3 which he sounded very remorseful. And he really sounded
4 genuinely sorry for what had happened.

5 And I knew that the State in the guilt phase was not
6 in a position to attempt to prove or even to reasonably
7 argue with any factual basis at all that Mr. Bush was the
8 trigger man. In fact, I know that Ron Wright, the medical
9 examiner, was going to testify that the stab wound
10 inflicted by Mr. Bush was superficial and was not fatal.

11 And I felt that this would put us in a position in
12 which I could argue to the jury, ask them to listen to that
13 third tape in which he sounded genuinely remorseful, and
14 ask them to consider that before they rendered their
15 verdict or voted, as it were, on the death penalty.

16 And this, in my view, gave us two closing arguments,
17 one during the sentencing phase and, really, in effect,
18 that gave us another closing argument back in the jury room
19 with just the jury and John talking to them on the tape.
20 And, really, that was the best that John had ever sounded
21 in terms of remorse and feeling sorry for what he'd done
22 about the case. I felt that was a good strategy and that
23 that would be, you know, the last thing that they would
24 hear before they voted on the case.

25 I knew that Bob Stone was going to use a very

1 emotional aggressive closing argument in sentencing just as
2 he had done in the guilt phase. And I felt that this last
3 exposure to John in the jury room by this tape recording
4 would be good particularly if there was nothing presented
5 beyond the State's bare bones sentencing phase evidence to
6 overcome that or to go against it.

7 So that was my strategy. I discussed it with John and
8 this was one of the things that we were talking about
9 during the entire trial, but particular when we got through
10 guilt phase as to whether he would testify or not. Because
11 the other thing I knew was that if he elected to testify,
12 that they would have him cross-examined by Jim Midelis.

13 Q What was your impression of Mr. Midelis on
14 cross-examination, his abilities on cross-examination?

15 A Well, he's probably the best prosecutor in
16 cross-examination of a defendant that I've ever been up
17 against. And he does an excellent job of it. And I did
18 not feel it was remotely in my client's best interest to be
19 cross-examined by Mr. Midelis.

20 So my recommendation from the beginning was that John
21 not testify. And there were lengthy conversations with
22 John and then with John and his brother and his father
23 because the officers would allow us, the three of us, to
24 speak together there at the bar during breaks and before
25 and after lunch and this type of thing.

Q Do you recall at what point Mr. Bush informed you he wanted to testify at the sentencing phase?

A Yes. John had made up his mind that he would follow my recommendation and not testify during the sentencing phase. So the State presented their case in the morning and rested and it was a bare bones case. And I think they anticipated that we would present some evidence and they were getting ready, basically, to come back with their -- I felt like their heavy artillery in rebuttal.

My strategy --

Q Let me just ask you one second. So their bare bones case in terms of aggravating was what you had anticipated they would do and that's, in fact, what happened?

A Right. I anticipated a bare bones case of aggravating circumstances with the saving of the heavy artilleries, a lot of which they couldn't use unless the door was opened or unless we presented some mitigating or attempted to present some mitigating evidence.

And the beauty of the tape in the jury room was that we didn't open any doors. That was a device that was utilized in closing argument. That tape was already in evidence. And we didn't have to risk anything by using that device as the strategy in the sentencing phase.

So, after a lot of discussions over several days, John had finally come to the -- I think -- to the decision to

follow my recommendation and not to testify. So the strategy was that after the lunch break, we would come back, I would stand up and announce that we rested without presenting any evidence in mitigation. And then we would go straight to closing argument.

And I had my closing argument designed around that strategy of basically the fact that they had a bare bones aggravation evidentiary case; the fact that the jury had already sealed his fate with 25-year minimum mandatory before he's even eligible for parole; and then ask them to play the tape in the jury room.

So we came back from lunch and it was still John's decision not to testify. And we then came from the bar. I think there was some discussion with his father, last minute. I forgot the nature of it.

We sat down at the table and the bailiff came in and announced, "All rise." And as we were standing up, John leaned over to me and said, "I've changed my mind. I want to testify." I said, "I don't recommend it." And he said, "I want to testify."

Q When he told you that, "I want to testify," you continued to recommend that he not testify?

A Right.

Q Once he had made the decision to testify, you had to put him on, did you not?

1 A Yes.

2 Q After all, it is the client's call in situations like
3 that, is it not?

4 A Exactly. And I had told John from the beginning, I
5 said, "I am your lawyer and I'll give you advice and I'll
6 make recommendations to you, but you have to make the final
7 decision about certain things." And this was one of them.

8 Q Based on your meetings with Mr. Bush and your
9 assessment of the facts as you knew them involving Mr. Bush
10 in this murder case, why do you think he did choose to
11 testify at the sentencing phase?

12 MR. NOLAS: I object, Your Honor. It's reading
13 another individual's state of mind.

14 MR. BARTMON: I'm asking him for his personal --

15 THE COURT: well, I realize that's difficult to
16 do, but I think we can hear the witness' perception as to
17 that decision, realizing that he can't read his mind. And
18 this is just his perception for what it's worth.

19 THE WITNESS: It was my impression that he did
20 that because he wanted to that extent to be in the
21 spotlight. This had been a high profile case from the
22 beginning. And it had received a lot of publicity. And
23 even during his incarceration, John was aware of the
24 publicity that it had received and, of course, the venue
25 was transferred to Fort Myers because of that.

1 It was my impression that we had gone through the
2 entire trial and he had been seated there and had not had a
3 chance to say anything. And that he simply wanted to be in
4 the spotlight and that was his -- he realized at that
5 moment that that was his last opportunity and he seized on
6 it.

7 BY MR. BARTMON:

8 Q How would you -- strike that.

9 What was your impression of the effect of the
10 cross-examination by Mr. Midelis of Mr. Bush in sentencing?
11 What effect was it?

12 A In my view, it was a complete disaster. It was the
13 worst possible thing that could have happened in the case.

14 Q What was your impression of how Mr. Bush came across
15 as a witness, particularly under cross-examination?

16 A Totally without remorse, ruthless, cold. He stared at
17 the jury, in my view, menacingly. And, you know, this went
18 on for an hour, an hour and a half. It was a disaster from
19 the defense standpoint.

20 Q And that was inconsistent with your desire to convince
21 the jury that at least in one of the statements the
22 defendant had remorse or felt sorry for what he did, was it
23 not?

24 A Right. Right.

25 Q Would you describe his impact or your impression of

1 his impact as that of a passive or submissive person?

2 A On the jury?

3 Q Yeah.

4 A No. No, he didn't come across that way at all. He
5 made the mistake of trying to take on Jim Midelis and
6 that's where Jim is an exceedingly good cross-examiner and
7 prosecutor. Mr. Midelis seems to instinctively know those
8 defendants that are going to want to try to match wits with
9 him. And he is extremely good at baiting them if they're
10 the least bit aggressive and causing them to become more
11 aggressive and hostile on the witness stand.

12 Q Is that what happened in this situation?

13 A Yes, he did. He caused John to become hostile. He
14 caused him to become aggressive and it came across in a
15 very negative way from the defense standpoint to the jury.

16 Q You were stating on direct examination that when you
17 met with Dr. Tingle you had told him all that you knew
18 about the facts, your impressions. Did you also talk to
19 him about your impressions of Mr. Bush's person?

20 A Yes, I did. I told him what my impressions were and
21 that he impressed me as a cold person. He described the
22 crime in dispassionate, ruthless terms. And I gave him all
23 the information that I had about it.

24 Q Did that information go to facts of the case of Mr.
25 bush's involvement as you knew it at that time?

1 A Yes.

2 Q Did you make him aware of the existence of Mr. Bush's
3 prior record, prior conviction, if you can recall?

4 A Of the facts of the prior conviction?

5 Q The fact that he had a prior conviction.

6 A Yes, I did.

7 Q Was there a discussion between you and Mr. Tingle of
8 both the -- strike that.

9 Did you discuss what the two of you felt in
10 consultation with each other based on review of this
11 material might be the down-side of such an evaluation of
12 Mr. Bush?

13 A Well, we did. After reviewing all the facts and all
14 the information that I could provide to Dr. Tingle, he
15 basically indicated that he didn't feel there was anything
16 positive that he could offer in terms of psychiatric
17 testimony, either in terms of competency, guilt phase,
18 or --

19 Q In terms of mitigation?

20 A -- terms of mitigation.

21 And that in all likelihood that the evidence that
22 would have been developed through the psychiatric
23 evaluation would have been to the contrary, that it would
24 have been adverse to mitigation; that Mr. Bush was in a
25 leadership position in the crime; that he did not feel

1 remorse, there was a lack of remorse; that the likelihood
2 of rehabilitation was not good, that type of thing.

3 Q Was part of your discussion involved -- did you
4 discuss with him what you knew of Mr. Bush's involvement
5 from what his co-defendants had said?

6 A Yes.

7 Q Did you know Dr. Tingle to be involved in any other
8 similar proceedings prior to the time you met with him on
9 this case?

10 A Yes, he had been involved in a number of criminal
11 cases in the St. Lucie County area, particularly because
12 early on, he and Dr. Raden were the only two psychiatrists
13 in Indian River County, and there were no psychiatrists in
14 St. Lucie County.

15 And in terms of court appointments to criminal cases,
16 he and Dr. Raden were about the only two that were even
17 eligible for appointment. So he had been involved in
18 numerous criminal cases prior to this case.

19 Q Did that go into your thinking in terms of asking for
20 his appointment initially?

21 A Oh, yes. Uh-huh.

22 Q What other factors did you use to ask for that
23 specific doctor?

24 A Well, I asked for Dr. Tingle specifically because in
25 my experience, he was a person who was more sympathetic to

1 the defense than Dr. Raden. He had a reputation for being
2 more liberal, if you will, in terms of the defense position
3 than Dr. Raden. And I knew that his credentials were good
4 and I knew that he made a good witness. And I knew that he
5 had been involved in prior criminal cases so he had
6 experience.

7 Q So then any information or indications he gave you of
8 a negative character in terms of what he could do for your
9 client, given what you knew about his reputation as
10 sympathetic to the defense, would be significant, wouldn't
11 it?

12 A Oh, yes. Uh-huh.

13 Q Do you ever recall Dr. Tingle saying that he didn't
14 want to be involved or wasn't interested in pursuing this
15 matter?

16 A No. He indicated after it was all said and done that
17 he didn't see that there was anything that he could do for
18 Mr. Bush, but he never said he didn't want to be involved.

19 Q At the conclusion of your discussion with him, was
20 there anything you felt that was capable of development
21 from the standpoint of proceeding with the evaluation that
22 would aid you in terms of mitigating circumstances?

23 A No, I didn't see anything that would have been of any
24 benefit, that would have -- from the standpoint of positive
25 mitigating evidence, that wouldn't be otherwise outweighed

1 by the potential negative aspect.

2 Q If mitigating evidence had been presented from the
3 standpoint of passive, that the defendant was passive, in
4 your view, would the State have tried to get in the
5 co-defendants' statements?

6 A Oh, yes.

7 Q Do you recall the nature of those statements and what
8 the other defendants said about Mr. Bush's involvement?

9 A Well, of course, Parker at one point said that Bush
10 was the shooter, but you know, that part didn't concern me
11 because I didn't think the State was ever reasonably going
12 to take that position because I didn't think that was the
13 evidence and I didn't think they needed to.

14 But there was more -- I had more concern over the fact
15 that there were statements to the effect that Mr. Bush had
16 said during the course of the abduction and prior to the
17 murder that, "We need to get rid of the victim," because he
18 -- it was either he or his brother had gone to prison once
19 before because they didn't get rid of the victim, and that
20 wasn't going to happen again.

21 And other statements to the effect that, you know,
22 he's been in prison and he's not going back. And the types
23 of statements that would have shown far greater intention
24 and involvement in the ultimate homicide that was really
25 demonstrated in the guilt phase and in the State's bare

1 bones sentencing phase.

2 Q Did you regard those statements as conveying a
3 cold-blooded person?

4 A Oh, yes. Yes. You know, the decision that we're
5 going to have to kill this person just so they won't be a
6 witness against us, that, to me, would have been
7 devastating, particularly in view of the prior crime.

8 The fact that the victim there -- the State, Bob
9 Stone, would have argued very strongly that what happened
10 was, in the prior case, the victim was allowed -- or was
11 not killed, and subsequently Mr. Bush was tried and
12 convicted. And then, of course, Stone's argument would
13 have been, you know, Mr. Bush wasn't going to let that
14 happen again. None of the other three defendants had that
15 type of factual situation in their background that Mr. Bush
16 did.

17 Q In your perception of the prior records of all four
18 defendants, did Mr. Bush have the worst prior record of the
19 four?

20 A I think so. Yeah. Yeah, he did have the worst
21 because he had that 30-year penalty.

22 Q Did you feel from the facts or the crime and Mr.
23 Bush's involvement as you knew it that he had any sort of
24 problems with intelligence?

25 A No. No, as a matter of fact, he had -- if the

co-defendants' statements were true -- had the ability to recognize during the course of the abduction that this scenario was beginning to be played out similar to what had happened to him and sent him to prison before. And that if he made the statements that they claim that he made that he stated that they would have to kill the witness to avoid a recurrence of his prior conviction.

Then, of course, after the incident, the murder weapon, I think, he took to his brother's house and then later apparently when the case got more publicity, went back and retrieved it and threw it, by his statement, threw it into Taylor Creek. It was never recovered, but he testified that he disposed of the murder weapon.

So that indicated to me that he was functioning with normal intelligence to realize what had occurred and what possible steps he could take to avoid detection and arrest.

Q Did that, in your view, show an ability to appreciate the criminality of his conduct?

A Yes.

Q In terms of -- do you recall that he gave his -- one of his statements against his attorney's advice at that time, I believe Mr. Schopp's advice?

A Yes. He gave a statement to Sheriff Holt contrary to Mr. Schopp's advice. And I think that was the fourth statement.

Q Do you recall if he initiated the contact with the sheriff or did the sheriff initiate contact?

A That was initiated by Mr. Bush. And it's my recollection that he sent word through the jail personnel that he wanted to tell his story directly to Sheriff Holt. And Sheriff Holt stated that he wouldn't speak with Mr. Bush until his lawyer was present.

Mr. Schopp was summoned and if I remember the information correctly, Mr. Schopp advised him not to make a statement. Mr. Bush gave Sheriff Holt a statement against his lawyer's recommendation and, again, I think, to be in the spotlight, that he had an opportunity to talk directly to the sheriff himself.

Q Do you recall what your impression was in terms of Mr. Bush's demeanor, character, personality when you reviewed the facts of him being stopped by the police in Indiantown after the murder was committed? Do you recall those facts?

A Yes. He was stopped by Deputy Tim Vargo. And this was in a remote portion of western St. Lucie County. And they were on their way back to Fort Pierce.

The murder was committed on State Road 76 in Martin County and then they had driven on down, I guess, to Indiantown which would have been another 15 or 20 miles and then come back up through the western part of the county on a road called Glades Cutoff Road.

1 And they were pulled over by Deputy Vargo and the
2 facts that developed were that -- of course, when they were
3 being pulled over, they had no way of knowing exactly what
4 it was for or whether it was related to what had just
5 happened. There was apparently some discussion about
6 whether they should shoot the deputy at that time and Mr.
7 Bush indicated, if I remember correctly, "Let's just wait
8 and see what happens."

9 And from Deputy Vargo's testimony -- Deputy Vargo was
10 deposed at length -- he testified that Mr. Bush was calm,
11 cool, and collected. And that he pulled him over for a
12 defective tail light and that he simply pulled him over and
13 asked to see his driver's license and registration. And
14 that Mr. Bush produced his driver's license and
15 registration and in all respects acted normally and did
16 absolutely nothing to call any suspicion upon himself or
17 the other three defendants that were in the vehicle with
18 Mr. Bush in a situation in which it would have taken very
19 little to call suspicion to them because I think by that
20 time it was about 3 or 4:00 in the morning. And they were
21 out there on Glades Cutoff Road with no apparent
22 destination or evidence of where they had been.

23 And, apparently, he handled himself very calmly and
24 collectively in spite of the fact that the victim had been
25 murdered within an hour of that period of time.

1 Q The time frame to you in terms of the murder and the
2 stop by the police was significant in terms of his mental
3 state, wasn't it?

4 A Sure. And Deputy Vargo just gave him a warning on the
5 defective tail light and sent him on his way. And then I
6 think there was a second traffic stop down the road when
7 there was some problem that came back on the computer with
8 the registration.

9 Q Do you recall the facts -- do you recall that the
10 defendant accepted the proceeds of the robbery money after
11 they had stopped at his brother's house to leave the gun
12 off?

13 A Yes.

14 Q Do you recall if Mr. Bush was identified as the person
15 who actually physically took the money from the store when
16 they robbed the store?

17 A I frankly can't recall whether Bush -- whether John
18 was identified as that person or not. I just simply can't
19 recall.

20 Q Do you recall whether Mr. Bush owned the gun or the
21 car that was involved?

22 A Yes. He owned the car and the gun.

23 Q Were those significant facts to you in terms of
24 possible mitigating circumstances?

25 A Oh, sure. Absolutely. I mean, those were the

instrumentalities of the crime. And, of course, Mr. Bush was driving the car. It was his car and he was driving.

Q Would it be significant in your view -- strike that.

Do you recall --

MR. BARTMON: One moment, Your Honor. May I have a moment?

THE COURT: Yes.

(Pause in the proceedings)

BY MR. BARTMON:

Q Knowing what you knew about the prior crime and Mr. Bush's participation in it, that combined with the facts we're just been going over that you were aware of in terms of his involvement in this crime, would you expect the State to have attempted to re-emphasize and stress those over and over had you produced mitigation of good character?

A Absolutely. I felt that we were walking a tight rope with respect to any attempt to present evidence on mitigation and that the State was just waiting, you know, with a lot of heavy artillery for us to do anything that would open the door and let them use any of that evidence or testimony.

Q Would the impact of opening the door have created a much greater case for the State than a bare bones case in terms of the presentation of aggravating circumstances?

A In my view, it would. And I really didn't see in terms of aggravating circumstances other than the bare judgment and sentencing in the prior offense that they were able to present that much more in the sentencing phase than they had already presented in the guilt phase.

So, it was sort of a -- the physicians' credo of, you know, first do no harm and then see what good can be accomplished. And I wanted to make sure first that I didn't make my client's case any worse in sentencing than it already was.

And then the next question to be addressed is, without making it worse, can it be improved? And that's what I developed and I had this quite a bit prior to trial. That's when I began to develop the strategy of using the third tape which is the one in which John really sounded good. He sounded good on that tape.

Q You were asked on direct testimony about evidence of the defendant's drinking. Do you recall whether or not the defendant admitted he knew what he was doing in his statements to the police?

A All four statements he admitted that he knew what he was doing.

Q Do you recall whether he admitted he knew what he was doing at the sentencing phase when he testified?

A I believe he did.

1 Q Would your impression of the stop you were speaking of
2 before by Officer Vargo lead you to believe that he was
3 drunk at the time of the crime?

4 A No. That was one of the key things in my mind that
5 the State would have presented. There wasn't even enough
6 alcohol on his breath or any impairment of his faculties to
7 cause Vargo to even go so far as to give him any roadside
8 tests.

9 Q Do you view that to be a significant fact in terms of
10 whether he was intoxicated at the time of the crime?

11 A Very significant because this is a late night stop by
12 a deputy and I know from experience in law enforcement,
13 particularly road officers, that in any late night stop
14 situation, one of the first things they're going to look
15 for is to determine whether the driver is under the
16 influence and that would be appropriate to make a DUI
17 arrest or at least to give roadsides. And it's been my
18 experience that they give roadsides if there's any
19 indication of alcohol on the breath or impairment of
20 faculties.

21 Q Would that not have been significant in terms of your
22 analysis of the mitigating circumstance of appreciating the
23 criminality of conduct and being able to perform that
24 conduct?

25 A Absolutely. And, of course, that, you know, I felt

1 that if we tried to present something like that and the
2 State rebutted it with that type of evidence, that that
3 would harm our credibility with the jury.

4 Q Did you feel the same way about the effect of that on
5 the mitigating circumstance of extreme mental or emotional
6 disturbance?

7 A Exactly. I felt that it would harm our credibility
8 with the jury and I felt that by the time we got to the
9 sentencing phase, the credibility with the jury was
10 paramount.

11 And that it was incumbent on me to try to make the
12 jury believe that John Bush was sorry that this happened,
13 and to do that without opening the door or the Pandora's
14 box to a lot of evidence by the State that would convicted
15 them that he wasn't sorry it happened and that he probably
16 would do it again.

17 Q Was it -- would it not be -- strike that.

18 Do you recall, based on your understanding of the
19 facts of the prior rape and robbery in 1974, whether there
20 was any evidence that Mr. Bush was drinking or was
21 intoxicated at the time?

22 A I don't recall any evidence of intoxication in that
23 incident.

24 Q Do you think the State could have used that absence of
25 intoxication in prior crimes in combination with the

1 absence of intoxication in this crime to rebut any attempt
2 to show mitigating circumstances of extreme disturbance or
3 appreciation of criminality of conduct?

4 MR. NOLAS: I object, Your Honor. The witness
5 didn't say there was an absence. He said he didn't recall.
6 He didn't say absence of evidence.

7 MR. BARTMON: Can I rephrase, Judge?

8 THE COURT: Rephrase.

9 BY MR. BARTMON:

10 Q Assuming there was evidence in the 1974 trial that
11 there was no evidence of intoxication or drinking and the
12 State used that in combination with the absence of that
13 evidence in this case, what kind of impact would that have
14 on mitigating circumstances of emotional disturbance or
15 appreciation of criminality of conduct?

16 A There was no doubt that the impact would have been
17 very negative. It would have been very bad for the
18 defense, you know, to attempt to show anything like that
19 because of that.

20 Q Based on your review of the evidence in this case and
21 review of the 1974 facts as you understood them and your
22 impressions of the defendant, did he ever indicate to you
23 or did you ever perceive any trouble or any difficulty that
24 the defendant may have had in being understood when he
25 spoke?

1 A When he spoke?

2 Q When he spoke.

3 A No, he was understood when he spoke. He was always
4 understood when he spoke. I mean, he told the jail
5 personnel he wanted to talk to Sheriff Holt and they got
6 Sheriff Holt over there to talk to him.

7 Q The statements in your memory, the statements he gave
8 to the police, did that indicate any problems with the
9 police understanding what he meant or he understanding what
10 they meant?

11 A No, he didn't have any problem communicating at all.
12 In fact, he wanted -- when he was first in custody before
13 he was actually arrested, there was some talk about a
14 possible alibi in West Palm Beach. And he took them down
15 there and showed them various places. And there was no
16 problem communicating there.

17 As a matter of fact, when we came over to Fort Myers
18 to try the case, before the trial started, they had brought
19 Mr. Bush up to the holding cell and for some reason they
20 brought his suit over, but they hadn't brought his shoes
21 over. And he made it very clear to people, to the officers
22 -- custodial officers that he was flat not going into the
23 courtroom without his shoes on.

24 And I was summoned in there because of this problem.
25 And, of course, I understood that and I told them, I said,

1 you know, "Go get the man's shoes. He's on trial here,"
2 which they did. But he appreciated that and communicated
3 that to them before I ever got there.

4 Q Do you recall based on your impression of the evidence
5 and your impressions of the defendant and the facts as you
6 knew them and investigated them whether there was any
7 indication that the defendant was out of touch with reality
8 at any time during the crime?

9 A No, there was no indication of that.

10 Q This crime, I mean, 1982.

11 A Right.

12 Q No indication whatsoever?

13 A No.

14 Q Do you believe that the facts of the disposal of the
15 weapon show that the defendant understood the incriminating
16 nature of his conduct during the crime?

17 A Yes.

18 Q How so?

19 A Well, the weapon he realized was the instrument of
20 death. And he had an appreciation of the fact that if a
21 bullet was recovered or a slug was recovered that it could
22 be traced to his gun ballistically. And that if he
23 disposed of that, that would be one less item of potential
24 evidence that could be detected and used against him.

25 Q If you had -- strike that.

1 Assuming that the defendant had a record in prison
2 during his incarceration for the prior crime that included
3 approximately 26 disciplinary reports in a three-year
4 period. Assuming further that the Sumter Correctional
5 Institute ultimately sought to transfer Mr. Bush from that
6 prison because he was an extreme disciplinary problem. And
7 assuming that you had presented it or there was information
8 that presented Mr. Bush was passive. Wouldn't you have
9 been concerned about the State's use of that possible
10 evidence --

11 MR. NOLAS: I object to that -- I'm sorry.

12 BY MR. BARTMON:

13 Q (Continued) -- would it be significant in terms of Mr.
14 Bush's character if you were aware of that kind of
15 information?

16 MR. NOLAS: And as I indicated, I object, Your
17 Honor. This is precisely what Strickland cautions against.

18 THE COURT: Well, there is no indication that he
19 was ever aware of that.

20 MR. NOLAS: Right.

21 THE COURT: So I think he'd be speculating now at
22 this point and using hindsight and quarterback -- Monday
23 morning quarterbacking, whatever you want to call it, if I
24 were to permit an answer. The objection is sustained.

25 MR. BARTMON: Okay, Your honor.

1 BY MR. BARTMON:

2 Q Was it significant in your view that the only common
3 denominator person in both crimes was John Earl Bush?

4 A Right.

5 Q Wouldn't the State have been able to emphasize that
6 had you brought -- had there been testimony introduced
7 about Mr. Bush's character?

8 MR. NOLAS: Objection, Your Honor. Same
9 objection.

10 THE COURT: This is information that he had in
11 the past.

12 MR. NOLAS: Mr. Muschott indicated he didn't have
13 that type of information. And now we're asking --
14 basically rephrasing the same kind of --

15 THE COURT: No. We're not talking about his
16 record in prison. Maybe I misunderstood your question.
17 Repeat the question.

18 BY MR. BARTMON:

19 Q Would it have been significant -- let me ask it a
20 different way.

21 Would it have been significant for the State to be
22 able to show that the only common denominator person in the
23 1974 crime and this crime was John Earl Bush of those that
24 were involved in those two crimes?

25 A Yes. I felt that was significant in that it would

1 have opened the door for the State to bring in a lot of
2 details of the '74 crime had we attempted to present
3 evidence, for example, that Mr. Bush was passive as opposed
4 to otherwise, or even evidence of good character.

5 And I was very concerned that anything that we did,
6 they would have been waiting to pounce on in rebuttal to
7 bring in facts of the prior crime and then also in some
8 instances, other evidence relating to the same incident
9 which they hadn't gotten in on the initial sentencing case.

10 Q Were you aware in any of your conversations with Mr.
11 Schopp who represented Mr. Bush in the 1974 trial, was
12 there any indication that at any time Mr. Bush had
13 indicated that the victim had consented to the sex in that
14 crime?

15 A No.

16 Q Was there any indication from Mr. Schopp that Mr. Bush
17 desired to have that as a defense to that crime?

18 A I think he did indicate that there was some talk about
19 that as a defense, but it was just simply not there in the
20 facts. And that this was what led to the discussion about
21 the fact that the witness, you know, was -- or the victim
22 in that case was traumatized to the extent, you know, that
23 she was still undergoing psychiatric therapy three or four
24 years after the incident.

25 Q Would it be possible -- was it part of your

1 consideration that the State could have argued if they got
2 the facts of the 1974 crime in that the defendant didn't
3 learn anything from that time until the time he was
4 convicted of being involved in the murder of Frances
5 Slater?

6 A Sure. That was the whole point, that they would have
7 then said the first imprisonment didn't do any good, the
8 second imprisonment isn't going to do any good, you've got
9 to recommend the death penalty. The argument goes without
10 saying. It would have been a very difficult argument to
11 overcome.

12 Q You were asked on direct examination about
13 considerations of whether the -- whether you were aware of
14 the defendant's problems in prison with being raped. And I
15 believe you said that he had indicated to you he had some
16 of those problems in prison. Would it be possible for the
17 State if you presented that sort of evidence -- let me ask
18 you this.

19 You understand that there's only two choices the jury
20 has, life imprisonment or death?

21 A Right.

22 Q Isn't it possible that if you present evidence of rape
23 in prison and of problems the defendant had in prison
24 you're running the risk of the State arguing that to the
25 effect that he was raped in prison, he doesn't like prison,

1 you have two choices, in fact, it might be used by the
2 State to convince the jury to give him the death penalty.

3 A Sure.

4 THE COURT: Did you have any of those type of
5 thoughts back at that time? Not now, but at the time.

6 THE WITNESS: Yes, sir, I did. The fact that
7 John had indicated to me that he had problems in prison,
8 that he didn't like prison, and it occurred to me that to
9 argue that then would open the door to the State to argue
10 that that meant that he was not going to go back to prison
11 again, even if it meant killing the victim who would have
12 been a witness against him.

13 BY MR. BARTMON:

14 Q You were aware of evidence of an incident where a
15 gentleman named Richard Douglas -- let me ask it a
16 different way. Let me rephrase.

17 Do you recall an incident you became aware of in
18 becoming aware of the facts of the night in question where
19 an individual named Richard Douglas was mugged in Jensen
20 Beach by the four defendants?

21 A That's right. That was not -- they didn't get that in
22 during the guilt phase. And Judge Trowbridge ruled that it
23 didn't meet the Williams rule test.

24 Q And did you consider in terms of presenting good
25 character evidence that the State would have then had an

1 open door to rebut that good character including getting in
2 that evidence of that prior mugging?

3 A Right. And the fact that there was an ongoing
4 criminal activity on the part of all the defendants that
5 night.

6 MR. BARTMON: One moment, Your Honor?

7 (Pause in the proceedings)

8 BY MR. BARTMON:

9 Q You were asked on direct examination about Georganne
10 Williams' visit to the prison and a statement by Parker to
11 her. Do you recall that another aspect of Mr. Parker's
12 statement to Georganne Williams was that, "With John's
13 prior record, it will all fall on him," or something to
14 that effect?

15 A I think so. I think I do recall that.

16 Q Do you recall that in relating that statement to Mr.
17 Bush that Mr. Bush -- Georganne Williams, I mean, relating
18 that statement to Mr. Bush -- that Mr. Bush responded,
19 "Keep it quiet"?

20 A Right.

21 Q Would you -- did you attribute any significance to
22 that response by Mr. Bush in terms of the appreciation of
23 the criminality of his conduct, the appreciation of his
24 prior record, and what impact it might have?

25 MR. NOLAS: Object, Your Honor. It's the

1 appreciation of the criminality of his conduct at the time
2 of the offense, not months later when a statement is made.
3 Now we're getting into competency type questions again.

4 THE COURT: When was that statement?

5 MR. BARTMON: It was made eight days after the
6 murder, Your Honor, if I'm not mistaken.

7 THE COURT: I don't understand your objection,
8 Mr. Nolas.

9 MR. NOLAS: The appreciation of the criminality
10 of his conduct in that regard involves a statement made
11 after the offense. The issue here is his understanding at
12 the time of the offense itself.

13 THE COURT: All right. And that's --

14 MR. BARTMON: I think the witness testified he
15 was aware of those facts when he was -- during sentencing.
16 I'm not asking him of something he wasn't aware or asking
17 him to assume anything.

18 THE COURT: So your question is merely was he
19 aware of those facts?

20 MR. BARTMON: And what -- yes. And to pursue
21 that, yes.

22 MR. NOLAS: I have no objection to was he aware
23 of it.

24 THE COURT: I think he's already testified that
25 he was.

What's your next question?

BY MR. BARTMON:

Q In your awareness of that, what would that say to you in terms of the defendant's appreciation of the criminality of his conduct and whether he could perform that conduct?

A Well, you know, that indicated to me that he was aware of the criminality of his conduct and what he had done. And what was necessary to attempt to avoid prosecution or at least to avoid any additional evidence of the crime, you know, coming to the attention of a prosecutor.

Q Would it be correct -- would it be a fair statement that in view of all of the evidence you were aware of from the '74 crime and from the '82 crime and from your impressions of the defendant that, when you considered the mitigating circumstances of extreme mental or emotional disturbance, or appreciation of criminality of conduct, or ability to perform conduct, you felt there was just no evidence to support that?

A I didn't feel there was. And any slender reeds that could have even remotely been developed in that area, I felt, were far outweighed by what the State would have brought back in rebuttal.

And the disadvantages or the negative aspects would have far outweighed any remotely possible beneficial effect. I felt that the strategy that I had devised to

work up some sympathy for Mr. Bush from the jury during the sentencing phase was something that we could do very effectively and do it without any risk at all. And, indeed, they did at least take the tape and listen to it. To that extent, my strategy was a success.

Q Do you think it would have been helpful to compare John Earl Bush and Frances Slater as victims to the jury?

A No, I think that would have been a big mistake. I wouldn't have wanted to have listened to Bob Stone's response to that from my client's standpoint.

Q Were you aware -- sure that.

Did you consider in mitigation attempting to argue --

MR. BARTMON: Could I have one moment, Your Honor? I'm sorry.

(Pause in the proceedings)

MR. BARTMON: I have no further questions.

THE COURT: Do you have any redirect?

MR. NOLAS: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. NOLAS:

Q Do you recall telling the jury at the penalty phase that there was a burden on the defense with regard to proving mitigating circumstances?

THE COURT: Do you have just one question?

MR. NOLAS: I'm sorry, Your Honor?

THE COURT: Do you have just one question?

MR. NOLAS: No, I was packing.

THE COURT: Then use the lectern.

MR. NOLAS: I wanted to save time here.

THE WITNESS: I'm sorry.

BY MR. NOLAS:

Q Do you recall telling the jury at the penalty phase in your argument that there was a burden that needed to be established with regards to establishing mitigating circumstances?

MR. BARTMON: I'm going to object because that's argumentative. It assumes facts not in evidence.

THE WITNESS: I don't have any specific recollection.

BY MR. NOLAS:

Q Do you remember what you told the jury with regard to the standard of proof on the defense in terms of establishing mitigating circumstances?

A I have no specific recollection of what I told them in that regard.

Q What is the standard of proof on the defense with regard to establishing mitigating circumstances?

A Well, to the best of my recollection -- and it's been a while since I've tried this case -- it was just preponderance.

Q Did you have any live witness testimony, any documentary evidence, anything prepared that could have been presented at the penalty phase?

A No.

Q You indicated, I think, during Mr. Bartmon's examination that that had been relayed to Mr. Bush?

A That I had nothing prepared?

Q Right.

A Yes. Uh-huh.

Q Would it be fair to say that the only affirmative defense evidence at the penalty phase was Mr. Bush's testimony?

A As it turned out.

Q And before he testified, did Mr. Bush know that if he didn't testify, there would be no affirmative evidence presented?

A Yes. Mr. Bush --

THE COURT: Had you told him of your strategy about using the tape, the third tape, or emphasizing that and your concern for his demeanor? Or did you have a concern for his demeanor if he testified?

THE WITNESS: Yes, I did.

THE COURT: I think you've already told us that. Did you tell Mr. Bush about that?

THE WITNESS: Yes, sir. That was the keystone of

1 the sentencing phase strategy. And early on -- once I
 2 heard that tape for the first time, I felt that this was --
 3 gee, this is the best evidence so far that we've got that's
 4 really going to work up some sympathy for John Bush and
 5 that really shows any indication that he felt a lot of
 6 sorrow and remorse for what had happened. And I thought
 7 that this is something that we could use.

8 And then as the case developed, I felt that it
 9 would be in John's best interest to utilize it in the
 10 fashion that I've explained previously and we could do this
 11 without any risk to him, that the State would not come back
 12 in rebuttal with any negative evidence that would be really
 13 harmful to him.

14 And at the same time, not only is it a no-risk
 15 situation, but it's a situation where you, in effect, get
 16 two closing arguments, one in front of the jury and, of
 17 course, we would then have first and last. That was a
 18 third benefit that we would have gotten.

19 We would have had first and last. And then we
 20 would have had even the last word beyond that back in the
 21 jury room. And I felt that in order to accomplish this, we
 22 had to basically do it that way, not present anything, but
 23 use the tape and ask them to listen to it.

24 And I explained to him what that would consist
 25 of. And, again, he understood that if we followed that

1 strategy that nothing would be presented. We would just
 2 use closing arguments after the state had presented their
 3 bare bones aggravating circumstance case.

4 BY MR. NOLAS:

5 Q Mr. Bush had told you about his prison background?

6 A Yes.

7 Q He told you about the circumstances attendant to that?

8 A Right.

9 Q He had also told you, I assume, some things about his
 10 family background?

11 A Right.

12 Q He had also told you some things about his educational
 13 background, I assume?

14 A Right.

15 MR. BARTMON: Object. That's beyond the scope of
 16 cross.

17 THE COURT: Well, to be honest with you, I'm not
 18 sure whether you got into that. I don't remember getting
 19 into that. You certainly got into it in your direct. It's
 20 seems like we're just going through matters that we've
 21 already heard.

22 MR. NOLAS: I'm sorry. I was just laying -- I
 23 was just laying the predicate, Your Honor.

24 BY MR. NOLAS:

25 Q He told you about his background?

1 A Sure.

2 Q And as you indicated to the judge, he was aware of the
3 fact that no evidence was going to be presented at the
4 penalty phase?

5 MR. BARTMON: Objection. Asked and answered
6 several times.

7 THE COURT: What are you getting at? We've heard
8 all of this.

9 MR. NOLAS: I'm sorry, Your Honor.

10 THE COURT: We've heard all of this. This is
11 just repetitious and not really directing to anything that
12 was on cross that I can see. If you have a point, make it.

13 MR. NOLAS: Yes, Judge.

14 BY MR. NOLAS:

15 Q After Mr. Bush was cross-examined, do you recall doing
16 any redirect examination?

17 A I believe I did, but I don't recall specifically what
18 it consisted of.

19 Q By the way, when Mr. Bush told you that he was going
20 to testify, did you ask the judge for time to confer with
21 him?

22 A No, I didn't. We just proceeded at that point. And I
23 indicated to him before he went on the stand that, you
24 know, I didn't have any direct prepared so that it was
25 going to be brief and he concurred. And we proceeded.

1 Q Did you after he testified -- his father was in the
2 courtroom during those proceedings, was he not?

3 A Yes.

4 Q Do you recall after he testified speaking to his
5 father about whether his father wanted to testify?

6 A After he testified?

7 Q Yeah, or during the course of -- right after that
8 decision was made.

9 A Well, after that decision was made, then he was on the
10 stand, so I had no opportunity to talk with his father.

11 Q Can you tell me specifically -- you indicated during
12 Mr. Bartmon's examination that you spoke to Dr. Tingle
13 about your perception of Mr. Bush as cold, something along
14 those lines?

15 A Right.

16 Q Did you ever --

17 THE COURT: His perception of what?

18 MR. NOLAS: Of Mr. Bush as cold.

19 THE COURT: As cold?

20 MR. NOLAS: Yes, Your Honor.

21 BY MR. NOLAS:

22 Q Did you ask Dr. Tingle what could be developed to
23 explain that impression?

24 A Well, we discussed what types of analyses Dr. Tingle
25 would go through and there was nothing in the course of

1 that discussion that indicated that he could develop
2 anytning beneficial to explain why, you know, I had that
3 impression.

4 Q would it be fair to say that the discussion with Dr.
5 Tingle was kind of cursory, it was kind of a summary
6 discussion?

7 MR. BARTMON: Objection. This has been asked and
8 answered.

9 THE COURT: I think so. Objection is sustained.

10 BY MR. NOLAS:

11 Q Out of the half hour that you spoke to Dr. Tingle, how
12 much of that time was devoted to insanity, a discussion of
13 insanity?

14 MR. BARTMON: Objection. That's beyond the
15 scope.

16 THE COURT: Well, I think you did get into --
17 very briefly, however. Didn't you have some questions
18 concerning --

19 MR. BARTMON: About the mitigating circumstances.
20 If that's what his question is directed to, I don't --

21 THE COURT: Well, I think indirectly it is by
22 wanting to know how much of the half hour was concerning
23 insanity. So it indirectly, I guess, it goes to that.
24 I'll hear it.

25 THE WITNESS: I would say less than ten minutes.

1 Probably about five minutes, maybe a little more.

2 BY MR. NOLAS:

3 Q And how much of that was devoted to competency?

4 A Competency, I think, probably was about the remaining
5 one-half of the remaining time, which would have been 20,
6 25 minutes. We spent about half that time on competency.
7 Maybe a little less than half.

8 Q A little less than half of 25 minutes?

9 A Right.

10 Q How much --

11 A Dr. Tingle -- excuse me. I don't mean to interrupt
12 you.

13 Q That's all right.

14 A He billed me for half an hour. My frank recollection
15 is we spent a little bit more time than that.

16 Q Do you have any notes in your file regarding the
17 discussion with Dr. Tingle other than the one I showed you
18 earlier?

19 A I've reviewed my file and I don't.

20 Q Were you aware of the fact that the judge at the time
21 he sentenced Mr. Bush on the 1974 case stated -- and I'm
22 quoting, Your Honor, from that record -- "All right. I
23 want you to listen to what I have to say. You have been
24 convicted of rape. There is a minimum sentence in rape
25 cases regardless of your age of 30 years. If I had the

1 sole say-so, I would not sentence you to that long a
2 period, but I have no alternative."

3 Did you ever become familiar with that statement by
4 the sentencing judge?

5 A No, I wasn't aware of that.

6 Q Would that have been something relevant, something
7 significant to know at the time?

8 MR. BARTMON: Objection. He just stated he has
9 no recollection.

10 THE COURT: He said he was not aware of it. Now
11 the question is what?

12 MR. BARTMON: I'll withdraw the objection, Judge.

13 MR. NOLAS: Let me rephrase that, Your Honor.

14 BY MR. NOLAS:

15 Q You indicated that -- I think Mr. Bartmon asked you
16 that Mr. Bush had something -- was the person in common in
17 these two cases?

18 A Right.

19 Q He would have to be the one person in common; isn't
20 that fair? He's the defendant on trial?

21 A Sure.

22 Q Were you aware of the fact that Mr. Cave had a rape
23 conviction?

24 A No, I don't think I was aware of that.

25 Q Were you aware of the fact that Mr. Parker had a

1 BY MR. NOLAS:

2 Q Based on your understanding of the law, does a capital
3 defendant in Florida have the right to confront State's
4 evidence at the penalty phase?

5 A It was my understanding that they would have been in a
6 position -- I know they had the other defendants under
7 subpoena for our trial. And, of course, from a self
8 incrimination standpoint, I knew that none of them would be
9 permitted to testify by their lawyers because we were the
10 first trial.

11 But it was my impression that they would attempt to
12 use the statements if they couldn't elicit testimony from
13 the co-defendants. And I was concerned that the statements
14 might get in.

15 MR. NOLAS: My question for the record, Your
16 Honor -- I don't think the court reporter got it -- was,
17 based on your understanding of the law in Florida, does a
18 capital defendant have confrontation rights at the penalty
19 phase? That was the previous question I asked.

20 THE WITNESS: My understanding is he does.

21 BY MR. NOLAS:

22 Q And are those the same as at the trial level?

23 A My understanding was at the time that they were the
24 same, but I was concerned that the statements might be used
25 if the defendants refused to testify on the grounds of self

1 incrimination, and that it would be considered as rebuttal.

2 Q If you presented statutory mitigating evidence, what
3 theory could the State have used to introduce those
4 statements that would not violate Mr. Bush's confrontation
5 rights?

6 A I don't know.

7 Q What specific evidence did the State have that you
8 were aware of at the time to rebut mitigation based on Mr.
9 Bush's family history, history of poverty?

10 MR. BARTMON: That's been asked and answered,
11 Judge.

12 THE COURT: What's the question again?

13 MR. NOLAS: What specific evidence was Mr.
14 Muschott aware of that the State may have had to rebut
15 mitigation based on Mr. Bush's history of poverty?

16 THE COURT: Objection is sustained. Let's don't
17 rehash your earlier questions. If you've got some specific
18 area of cross-examination that you'd like to clear up--

19 MR. NOLAS: I never realized all of that, Your
20 Honor.

21 THE COURT: -- I'll be glad to hear that.

22 BY MR. NOLAS:

23 Q The various decisions you made at the time that you
24 discussed with Mr. Bartmon, is it fair to say that all of
25 those decisions were based on what you knew then and what

1 you had then?

2 A Right.

3 Q And you can't tell us today what your decision would
4 have been back then based on different facts, if there were
5 different facts involved in this case that you were aware
6 of?

7 MR. BARTMON: Objection, Your Honor. That's the
8 basis of their whole claim.

9 MR. NOLAS: I don't understand that, Your Honor.

10 THE COURT: I'm not sure I do either, but --

11 MR. BARTMON: Their whole claim is based upon
12 information they say should have been presented.

13 THE COURT: Yes. Well, I think it will be asking
14 the witness to use some sort of hindsight at this point if
15 he had all of this information that you would like to
16 present and had presented under the theory that if he had
17 done more investigation, he would have had this
18 information, I presume. Now you want him to say what he
19 would have done if he had had the information.

20 MR. NOLAS: No, Your Honor. I just want Mr.
21 Muschott to tell us that that question cannot be answered
22 today with hindsight as a factual matter. I know it's
23 there in stone as a legal matter, but I just want to know
24 from Mr. Muschott.

25 THE COURT: Well, it's obvious the answer. You

A Right. I think that was the criminologist portion.

Q Well, I think the record can speak for itself in that regard.

A Okay. That's right. Yeah. I haven't seen that particular motion for Dr. Tingle.

Q He never was evaluated?

A Right.

MR. BARTMON: Asked and answered, Judge.

THE COURT: Yeah, that's been established.

BY MR. NOLAS:

Q If Dr. Tingle had evaluated Mr. Bush and the results of that evaluation would have been devastating, could Mr. Bush have been in any way harmed by that?

MR. BARTMON: Objection. Calls for speculation.

THE WITNESS: No.

THE COURT: Well, you know --

THE WITNESS: I'm sorry, Your Honor.

THE COURT: We are -- I don't know. I guess he can answer that, but I think it's really a matter of argument. I don't think this witness' opinion at this stage of the proceeding has much probative value on that issue. But he's answered the question.

BY MR. NOLAS:

Q You indicated that Mr. Bush appeared to be cold, appeared to be ruthless, I think was another word you used.

A Did I personally think he deserved it?

Q Yeah. In 1984.

MR. BARTMON: I fail to see the relevancy of that.

THE COURT: I fail to see that either. You want to argue that?

MR. NOLAS: I could argue it, Your Honor. I think it is relevant. The attorney's personal feelings is relevant to his perspective of the case.

Let me rephrase that, Your Honor. Withdraw it.

BY MR. NOLAS:

Q Did you believe that this was a case which was proper for the death penalty?

MR. BARTMON: Asked and answered, Your Honor.

THE COURT: Well, he has testified that he felt that the State had a strong case. Isn't that your feeling?

THE WITNESS: Yes, sir. Strong case, right, from an evidentiary standpoint, particularly in the guilt phase.

MR. BARTMON: I think he also testified about the penalty phase.

THE COURT: Objection is sustained.

MR. NOLAS: Yes, Your Honor.

THE COURT: It's already been covered.

(Pause in the proceedings)

THE COURT: If it takes this long to think about

1 the next question, it probably shouldn't be asked.

2 MR. NOLAS: No, Your Honor. What I'm doing is
3 I'm skipping over about 15 of them to try to streamline
4 things for you.

5 BY MR. NOLAS:

6 Q What specific evidence did the State have that it
7 could have used to rebut the statutory mitigating
8 circumstance relating to a defendant's capacity?

9 A To capacity?

10 Q Yeah.

11 MR. BARTMON: I think this has been asked and
12 answered.

13 THE COURT: Well, I think --

14 MR. BARTMON: I'm not trying to be obstreperous,
15 but I really think that's been asked and answered.

16 THE COURT: Well, he's pretty well told us what
17 information he was aware of that the State had. And I
18 think -- I don't know whether it was specifically asked as
19 to that state of mind if that's what it is, the capacity.
20 I don't remember it being asked as to that specific issue.

21 MR. BARTMON: Well, I recall -- I don't recall
22 then if that's the case that that was covered on his
23 direct.

24 THE COURT: I don't either, but go ahead and
25 answer it.

1 contemplate from a nonstatutory point of view, that
2 practically anything could have conceivably have opened the
3 door to that.

4 Q And in 1982, you didn't have any of those
5 circumstances to balance against the '74 case, did you?

6 A I'm sorry?

7 Q In 1982, you didn't have any evidence of those
8 mitigating circumstances to balance against that '74 case?

9 A You mean positive evidence?

10 Q Yeah.

11 A Right.

12 MR. NOLAS: If I may just have a moment, Your
13 Honor.

14 (Pause in the proceedings)

15 BY MR. NOLAS:

16 Q You indicated during cross-examination that you
17 thought the State was saving its heavy artillery for
18 rebuttal. What was that again? What was that heavy
19 artillery you referred to?

20 A Well, details of the '74 incident, attempting to get
21 in statements by the co-defendants regarding involvement in
22 the '82 incident, and that type of thing.

23 Q Did you -- before Mr. Bush testified, did you have
24 occasion to go over his testimony with him at any time?

25 A You mean in the sentencing phase?

Q Yeah.

A No, I didn't have an opportunity because it was a last second decision on his part.

Q Did you do a question and answer type of thing with him before that?

MR. BARTMON: Objection, he just --

THE COURT: He has told us that Mr. Bush was going to follow his advice and not testify until they both stood up and he said he had changed his mind. So how could he have had a question and answer session with him.

MR. NOLAS: At any point. At some point early on.

THE COURT: He said to that point he was not going to; isn't that correct?

THE WITNESS: Yes, sir, that's correct.

THE COURT: So, obviously he didn't have -- don't waste our time now with those kinds of questions.

MR. NOLAS: Yes, Your Honor.

BY MR. NOLAS:

Q When was the decision first made that Mr. Bush should not testify?

A When was the final decision made or when was my first recommendation?

Q First recommendation.

A After I heard the third tape, I began talking to him

her under a subpoena.

Q Did you ever depose her?

A No.

Q Was she available there at the penalty phase? Did you see her there?

A I don't know if she was present or not.

Q Were you familiar with what happened to her after that 1974 case, with where she resided, whether it was in Florida or elsewhere?

A The only information I had about her was what I had learned about her being under continuing psychiatric care.

Q Did the State on their witness list list any witnesses relevant to that 1974 case other than the two parole type officers they put on?

THE COURT: By the way, they were just custodian witnesses. They didn't testify to any facts about that case, did they?

MR. NOLAS: Well, I think their testimony should speak for itself, Your Honor.

THE COURT: I'm asking you. You've read it.

MR. NOLAS: Yes. I think they did.

THE COURT: You think they did?

MR. NOLAS: Yes.

THE COURT: Well, I just looked at that over lunch and I didn't think so. Are you sure?

MR. NOLAS: The sentence came out. Some of what was discussed with Bush was --

THE COURT: Well, yes, but that's all -- you seemed to make a statement earlier before lunch that -- or at least led me to believe that you interpreted their testimony at the sentencing phase, that is the probation officer -- and who was the other witness?

MR. NOLAS: That was a parole officer and I think a law enforcement officer.

THE COURT: Yes. And that their testimony would have permitted Mr. Stone to make some of the arguments that he made in his closing. I don't think that's right. Do you think that's right?

MR. NOLAS: Yes, Your Honor. They said it was a forcible rape. They said it was a forcible robbery. They said it was a violent offense. They said it was --

THE COURT: Well, I don't know that that would permit some of the things that were said. Well, I'll look at it again, but I'm not sure I agree with your characterization of that.

MR. NOLAS: Yes, Your Honor.

BY MR. NOLAS:

Q Mr. Muschott, specifically who was listed on the State's witness list other than these two folks we're just talking about relevant to the 1974 offense?

A My recollection is that they listed the victim. I could be wrong about that.

Q If the victim's name is not on the witness list, could that be an indication that the State was not going to call her?

A Well, I --

THE COURT: Well, what is the State rule in regard of the filing of witness lists for rebuttal witnesses?

THE WITNESS: A rebuttal witness as an impeachment witness is not required to be listed.

MR. NOLAS: I disagree, Your Honor, but we can take that up as well.

THE COURT: Well, I don't require it in Federal court, if you don't know about a rebuttal witness. I don't know what they require. What is it in Martin County? That's what's important.

THE WITNESS: Well, the rule down there is they're not required unless it's planned impeachment or planned rebuttal. In other words, if they actually know that something is going to be presented and they know that they're going to use this witness. And then it depends on the circumstances.

BY MR. NOLAS:

Q Did you ever attempt to depose any witnesses from the

1 1974 case?

2 A No.

3 Q Did you ever see any of them down at the courthouse?

4 THE COURT: Didn't he testify earlier that the
5 only information he had about this was from the Public
6 Defender, Mr. Schopp?

7 THE WITNESS: Yes, sir.

8 THE COURT: Isn't that correct?

9 THE WITNESS: Yes, sir. I wouldn't have known
0 the victim if I had seen her. I don't know what she looked
1 like. She might have been there and I didn't recognize
2 her.

3 BY MR. NOLAS:

4 Q Any motions for costs or anything like that that were
5 filed that you saw regarding transporting witnesses for the
6 1974 case to Mr. Bush's trial?

7 MR. BARTMON: Objection per your comments, Judge.
8 He's testified to what he knew about that crime.

9 MR. NOLAS: I'm not asking a knowledge question,
0 Your Honor.

1 THE COURT: The objection is sustained.

2 MR. NOLAS: Thank you, Judge. I have nothing
3 further.

4 THE COURT: Thank you, sir. You may step down.

5 THE WITNESS: Thank you, Your Honor.

NO 93-6431

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

JOHN EARL BUSH,

Petitioner,


vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, Celia A. Terenzio, a member of the Bar of this Court, hereby certify that on this 18th day of November, 1993, a copy of the APPENDIX TO Petition for Writ of Certiorari in the above-entitled case was furnished by United States Mail to: BILLY H. NOLAS, ESQUIRE and JULIE D. NAYLOR, ESQUIRE, P. O. Box 4905, Ocala, Florida 34478, counsel for the petitioner herein. I further certify that all parties required to be served have been served.


CELIA A. TERENZIO
Assistant Attorney General
Florida Bar No. 656879
OFFICE OF THE ATTORNEY GENERAL
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
(407) 688-7759

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 25, 1993

Billy H. Nolas
P.O. Box 4905
Ocala, FL 34478

Re: John Earl Bush,
v. Harry K. Singletary, Secretary, Florida
Department of Corrections
No. 93-6431

Dear Mr. Nolas:

The petition for a writ of certiorari in the above
entitled case was docketed in this Court on October 18, 1993
as No. 93-6431.

A form is enclosed for notifying opposing counsel that
the case was docketed.

Very truly yours,

William K. Suter, Clerk

by

Melissa A. Blalock
Assistant

Enclosures